

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

SAFWAT ABDEL-HADY

PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA

DEFENDANT

Abdel-Hady v Commonwealth of Australia

[2026] HCA 17

Date of Hearing: 11 November 2025

Date of Judgment: 10 June 2026

S65/2021

ORDER

The question stated for the opinion of the Full Court in the special case filed on 13 August 2025 be answered as follows:

Question: Do the Commonwealth and its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?

Answer: No.

Representation

B W Walker SC with M Tanevski and A M Khadra for the plaintiff
(instructed by Slan Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, and
T M Begbie KC with J E Davidson SC and O J Ronan for the defendant
(instructed by Australian Government Solicitor)

BOE21 intervening by leave, limited to written submissions

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Abdel-Hady v Commonwealth of Australia

Tort – False imprisonment – Defences – Where plaintiff detained under s 189(1) of the *Migration Act 1958* (Cth) following visa cancellation – Where since 28 July 2022 there was no real prospect of plaintiff's removal from Australia becoming practicable in reasonably foreseeable future – Where in November 2023 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 reopened and overruled *Al-Kateb v Godwin* (2004) 219 CLR 562 – Where effect of *NZYQ* was that ss 189(1) and 196(1) of the *Migration Act* did not authorise plaintiff's detention from 28 July 2022 – Where Commonwealth accepted elements of tort of false imprisonment established – Where Commonwealth accepted it was vicariously liable for liability of detaining officer – Where Commonwealth propounded novel common law defence to negative liability from 28 July 2022 to time of orders in *NZYQ* on 8 November 2023 – Whether Commonwealth's defence should be recognised to negative common law liability of detaining officer for tort of false imprisonment.

Constitutional law – Judicial power – Where detaining officer reasonably understood statutory duty to be to keep plaintiff in immigration detention by reason of *Al-Kateb* – Whether protection of officer from liability would enhance respect for and compliance with law declared by High Court – Whether *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396; 421 ALR 376 supported novel defence.

Words and phrases – "agency", "bound to execute", "common law defence", "common law judicial immunity", "compliance with the law", "constitutional invalidity", "constitutional responsibility", "derivative liability", "detaining officer", "detention", "direct liability", "false imprisonment", "immunity", "institutional imperatives", "judicial independence and impartiality", "judicial power", "law enforcement privilege", "legal norm", "legislative power", "no real prospect of removal", "novel defence", "principle of legal equality", "purported performance", "reasonably foreseeable future", "rule of law", "separation of powers", "statutory duty", "unlawful non-citizen", "vicarious liability".

Constitution, Ch III.

Migration Act 1958 (Cth), ss 3A, 5, 189(1), 196(1), 198.

Public Service Act 1999 (Cth), ss 7, 13(4), 15.

Canadian Charter of Rights and Freedoms, s 24.

1 GAGELER CJ, GLEESON AND BEECH-JONES JJ. Our constitutional system of responsible government under the rule of law is underpinned by three foundational principles. The first is that "all power of government is limited by law".¹ The second is that "[i]t is emphatically the province and duty of the judicial [branch of government] to say what the law is",² including "the law that limits its own power and the power of other branches of government".³ The third is that it is, equally emphatically, the responsibility of the executive branch of government to ascertain the law that limits its own power and to comply with that law.⁴

2 This Court, by virtue of its position at the apex of the judicial branch of government, is "the ultimate decision-maker in all matters where there is a contest".⁵ The law declared by the Full Court of this Court in deciding a matter in its original or appellate jurisdiction concerning the limits of governmental power is the law thereafter to be applied in accordance with the rules of precedent by all Australian courts of competent jurisdiction to determine the rights and obligations of parties to disputes concerning compliance with those limits and concerning legal consequences of non-compliance. The continuity of the law so declared by this Court is subject to constitutional alteration or valid legislative change. The continuity of the law so declared is also subject to the capacity of this Court to reopen, to reconsider and, "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken",⁶ to overrule its prior decisions.

3 The constitutional responsibility of an executive government to ascertain and comply with the law as ultimately declared by this Court can combine with the susceptibility of a prior decision of this Court to being reopened and overruled

1 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

2 *Marbury v Madison* (1803) 5 US 137 at 177.

3 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

4 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [55]-[56]; *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383.

5 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [104].

6 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70]. See also *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 150 [17].

sometimes to result in executive action that was compliant with the law as previously declared by this Court being revealed by a subsequent decision of this Court to have lacked lawful authority. The undisputed theory of our constitutional system being that invalid legislation "is, in legal contemplation, as inoperative as though it had never been passed" (such that the invalid law "confers no rights", "imposes no duties" and "affords no protection"),⁷ a subsequent declaration of constitutional invalidity can thereby reveal the action in retrospect to have exposed the executive government or its officers to civil liability at common law.⁸

4 That is what occurred in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*⁹ when this Court reopened and overruled the constitutional holding in its earlier decision in *Al-Kateb v Godwin*¹⁰ to hold, contrary to *Al-Kateb*, that ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) are inconsistent with Ch III of the *Constitution*, and are therefore invalid, in their application to an unlawful non-citizen whose removal from Australia under s 198 has no real prospect of becoming practicable in the reasonably foreseeable future.

5 The result of the constitutional holding in *NZYQ* is that ss 189(1) and 196(1) of the *Migration Act* must be taken always to have been invalid in their application to an unlawful non-citizen whose removal from Australia under s 198 has no real prospect of becoming practicable in the reasonably foreseeable future. To the extent of that invalidity, the statutory duty imposed by ss 189(1) and 196(1) on an "officer" within the meaning of the *Migration Act*, who may but need not be an officer of the executive government of the Commonwealth employed under the *Public Service Act 1999* (Cth),¹¹ to detain a person whom the officer reasonably suspects to be an unlawful non-citizen must be taken always to have been incapable

7 *Haskins v The Commonwealth* (2011) 244 CLR 22 at 42 [45], quoting *Norton v Shelby County* (1886) 118 US 425 at 442. See also *South Australia v The Commonwealth* (1942) 65 CLR 373 at 408; *New South Wales v Kable* (2013) 252 CLR 118 at 138 [51].

8 See *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 341-342; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 230-231. Eg *James v Cowan* (1930) 43 CLR 386; *James v The Commonwealth* (1939) 62 CLR 339; *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633; *Mason v New South Wales* (1959) 102 CLR 108; *Ha v New South Wales* (1997) 189 CLR 465.

9 (2023) 280 CLR 137.

10 (2004) 219 CLR 562.

11 See s 5(1) of the *Migration Act* (definition of "officer").

3.

of providing lawful justification for detention in reliance on those provisions and can therefore furnish no answer to a common law action in false imprisonment against the detaining officer. That is so even if the detention occurred during a period after the decision in *Al-Kateb* and before the decision in *NZYQ*.

6 The sole question reserved for determination by this special case in a proceeding in the original jurisdiction of this Court is whether that exposure of the detaining officer to liability for the tort of false imprisonment should be ameliorated by recognition of a novel common law defence. The propounded defence, of uncertain scope, is argued by the Commonwealth to be available at least to an officer of the executive government of the Commonwealth who is employed under the *Public Service Act* and who acted in the purported performance of a statutory duty to detain in conformity with the law as declared in a prior decision of this Court which has been held in a subsequent decision of this Court to have been erroneous.

7 No such common law defence should be recognised. No development of the common law can be inconsistent with constitutional principle.¹² Far from protecting the judicial declaration of the law and enhancing the responsibility of the executive branch of government to ascertain the law that limits its own power and to comply with that law, as the Commonwealth argues, recognition of the propounded common law defence would subvert the accepted foundational constitutional principles of judicial authority and executive responsibility. It would transform the responsibility of an officer of the executive government of the Commonwealth to ascertain and comply with the law that limits the power of the officer into a common law immunity from a common law consequence of action which has subsequently been judicially determined to have transgressed such a legal limit and therefore to have exceeded that power.

Factual and procedural history

8 The plaintiff is a citizen of Austria who has long suffered from thrombophilia, being an extreme tendency to the formation of blood clots within arterial or venous blood vessels. Having first arrived in Australia in 1997, he held various visas until 31 March 2017 when his then current visa was cancelled by the Minister for Immigration and Border Protection under s 501(2) of the *Migration*

12 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 220 [20]; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [44].

Act, following which he was located and on 22 August 2017 detained under s 189(1) of the *Migration Act*.

9 By a proceeding commenced in the original jurisdiction of this Court in 2021 against the Commonwealth, the plaintiff sought declaratory relief together with constitutional and other writs with respect to his detention as well as damages for false imprisonment. The part of the matter which involved questions as to the plaintiff's entitlement to declaratory relief and constitutional and other writs with respect to his detention was remitted to the Federal Circuit and Family Court of Australia (Division 2) ("the FCFCOA") under s 44(1) of the *Judiciary Act 1903* (Cth). The part of the matter which involved questions as to the plaintiff's entitlement to damages for false imprisonment was left pending in this Court.

10 Whilst the part of the matter remitted to the FCFCOA remained pending in that Court, the plaintiff suffered a documented episode of thrombophilia. The episode gave rise to a question as to his fitness to travel from Australia to Austria. Having regard to medical assessments prepared for the purpose of the FCFCOA proceeding, the Commonwealth eventually came to accept that the plaintiff's thrombophilia had rendered him medically unfit to travel by any commercial aeroplane from 28 July 2022, as a consequence of which he was released from detention on 13 February 2024.

11 The part of the matter that had been remitted to the FCFCOA was subsequently resolved by the FCFCOA making orders by consent. Those orders included a declaration to the effect that, throughout the period from 28 July 2022 to 13 February 2024, there was no real prospect of removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future, as a consequence of which his detention during that period was not authorised by ss 189(1) and 196(1) of the *Migration Act*.

12 Before this Court, the parties are agreed that, from the time of his detention on 22 August 2017 until the time of his release on 13 February 2024, the plaintiff: was an "unlawful non-citizen" within the meaning of the *Migration Act*;¹³ and was detained by an officer in "immigration detention" within the meaning of the *Migration Act*.¹⁴

13 The parties are also agreed that, during the period from 28 July 2022 to 8 November 2023 when the plaintiff continued to be detained with no real prospect of removal from Australia becoming practicable in the reasonably foreseeable

13 See ss 14 and 189(1) of the *Migration Act*.

14 See s 5(1) of the *Migration Act* (definition of "immigration detention").

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future, the detaining officer: was an employee of the Commonwealth employed under the *Public Service Act* and an "officer" within the meaning of the *Migration Act*;¹⁵ was required as part of his duties to assess from time to time whether he knew or reasonably suspected that persons including the plaintiff were unlawful non-citizens and, if so, to keep them in immigration detention under ss 189(1) and 196(1) of the *Migration Act*; and reasonably suspected that the plaintiff was an unlawful non-citizen.

14 Having regard to *Al-Kateb* having held ss 189(1) and 196(1) of the *Migration Act* not to be invalid in their application to an unlawful non-citizen whose removal from Australia under s 198 had no real prospect of becoming practicable in the reasonably foreseeable future, and having regard to the requirement of s 13(4) of the *Public Service Act* that the detaining officer as an employee of the Commonwealth "must comply with all applicable Australian laws", the parties are further agreed that, throughout the period from 28 July 2022 until the time of the making of orders in *NZYQ* on 8 November 2023, the detaining officer reasonably understood his duty to be to keep the plaintiff in immigration detention until the plaintiff was actually removed from Australia.

15 By an amended statement of claim in that part of the matter which has remained pending in this Court, relying on the declaration made by the FCFCOA that his detention from 28 July 2022 to 13 February 2024 was not authorised by ss 189(1) and 196(1) of the *Migration Act*, the plaintiff now claims damages for false imprisonment against the Commonwealth in respect of the entirety of that period. The plaintiff puts the claim primarily on the basis that the detaining officer is liable in false imprisonment and that the Commonwealth as employer of the detaining officer is vicariously liable for any liability of the detaining officer.¹⁶ The plaintiff puts the claim alternatively on the basis that the detaining officer acted as an agent of the Commonwealth such that the Commonwealth is directly liable for the acts of the detaining officer.¹⁷

16 By its defence to the amended statement of claim the Commonwealth admits, consistently with the declaration made by the FCFCOA, that detention of the plaintiff by the detaining officer from 28 July 2022 to 13 February 2024 was not authorised by ss 189(1) and 196(1) of the *Migration Act*. The Commonwealth

15 See s 5(1) of the *Migration Act* (definition of "officer").

16 See *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1361 [44]; 419 ALR 552 at 564.

17 See *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1358 [31]; 419 ALR 552 at 560.

thereby accepts that the elements of the tort of false imprisonment – the detention of the person and the unlawfulness of that detention¹⁸ – are established in respect of the entirety of that period of detention.

17 Eschewing reliance on the principle that "[w]hen the Crown or a public authority is the employer of a public officer who is charged by statute with the exercise of an 'independent responsibility cast on him by law' ... , what is done in discharge of that responsibility is not done on behalf of the employer",¹⁹ the Commonwealth also admits that it is vicariously liable for any liability that the detaining officer has for the tort of false imprisonment whilst denying that it has any direct liability for the acts of the detaining officer in purported performance of the duty imposed by ss 189(1) and 196(1) of the *Migration Act*.

18 With respect to the period from the time of there first being no real prospect of removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future on 28 July 2022 to the time of the making of orders in *NZYQ* on 8 November 2023, however, the Commonwealth propounds the novel defence, which it argues to be a defence to tortious liability in the strict sense of involving confession and avoidance.²⁰ The Commonwealth propounds the novel defence to negative the liability which it accepts the detaining officer otherwise has for the tort of false imprisonment, as well as to negative any direct liability it might have for the acts of the detaining officer.

19 The propounded defence distils to three elements. The first is that the detaining officer acted in the purported performance of a statutory duty to detain, being that imposed by ss 189(1) and 196(1) of the *Migration Act*. The second is that the detaining officer so acted in conformity with the law as declared in a prior decision of this Court, being *Al-Kateb*. The third is that the detaining officer, as an officer of the executive government of the Commonwealth and as an employee of the Commonwealth subject to the requirement of s 13(4) of the *Public Service Act* to comply with "all applicable Australian laws", was under an "independent legal duty" to obey the law as declared by this Court.

18 See *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 206-207 [24]-[25]; see also at 238 [134].

19 *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 662, quoting *Musgrave v The Commonwealth* (1937) 57 CLR 514 at 548.

20 *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at 368 [74]; see also at 382 [118].

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20 In that procedural context, the parties reserve by the special case a single question of law for the opinion of the Full Court:

"Do the Commonwealth and its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?"

21 The framing of the question is problematic. By failing to distinguish between the distinct bases on which the plaintiff claims the Commonwealth to be liable for the tort of false imprisonment, the question masks a logically anterior question as to whether, absent the propounded defence, the Commonwealth would be directly liable for the acts of the detaining officer in the purported performance of the statutory duty to detain imposed by ss 189(1) and 196(1) of the *Migration Act*. That logically anterior question is legally and factually contested, has not been the subject of full agreement as to the facts or full argument as to the law, and need not be determined.

22 The problem is resolved by the Commonwealth's pleaded acceptance that the Commonwealth is vicariously liable for the liability of the detaining officer if the propounded defence does not negative the liability of the detaining officer. The Commonwealth has also made plain that, if the defence does not negative the liability of the detaining officer, the Commonwealth would not propound the defence as negating any direct liability the Commonwealth itself might have.

23 To determine the question reserved by the special case in the negative, it is therefore sufficient to conclude that the propounded common law defence should not be recognised to negative the common law liability of the detaining officer for the tort of false imprisonment.

The asserted basis of the propounded defence

24 The Commonwealth's argument that the propounded common law defence should be recognised to negative the common law liability of the detaining officer for the tort of false imprisonment seeks to draw by analogy on reasoning of the plurality in *Queensland v Stradford (a pseudonym)*²¹ which contributed to the recognition in that case of the common law of Australia affording a measure of protection from liability "to those who have a legal duty to enforce or execute

orders or warrants made or issued by a court in judicial proceedings ... even if those orders or warrants are invalid".²²

25 The premise of the Commonwealth's argument, as reflected in the framing of the third element of the propounded defence, is that the responsibility of the executive government of the Commonwealth to ascertain the law that limits its own power and to comply with that law corresponds to an independent legal duty on the part of an officer of the executive government of the Commonwealth to ascertain and comply with the law that limits the power of that officer which is analogous to a legal duty to enforce or execute orders or warrants made or issued by a court. Building on that premise, the Commonwealth argues that to protect such an officer who has acted in the purported performance of a statutory duty to detain in conformity with the law as declared in a prior decision of this Court from liability for the tort of false imprisonment would enhance "the authority of judicial proceedings"²³ in that it would enhance respect for and compliance with the law as declared by this Court.

26 The Commonwealth argues that affording protection from liability for the tort of false imprisonment to such an officer would also reflect the unreasonableness, if not invidiousness, of the officer being put to a choice as to whether to comply with the officer's legal duty as that duty has been declared in a prior decision of this Court or to comply with the officer's legal duty as that duty might be predicted to be declared in a subsequent decision of this Court and facing the prospect of incurring legal liability either way.²⁴ The Commonwealth goes so far as to invoke language quoted by the plurality in *New South Wales v Kable*²⁵ in describing the status of the officer being put to such a choice as "almost a status of anarchy".

27 The Commonwealth illustrates its argument by postulating the scenario of an officer who chose in the period after *Al-Kateb* and before *NZYQ* to release from immigration detention an unlawful non-citizen whose removal from Australia under s 198 had no real prospect of becoming practicable in the reasonably foreseeable future. The Commonwealth points out that, consistently with the

22 (2025) 99 ALJR 396 at 433 [149]; 421 ALR 376 at 415.

23 cf (2025) 99 ALJR 396 at 428 [128], 433 [148]-[149]; 421 ALR 376 at 408, 415, citing *Kable v New South Wales* (2012) 293 ALR 719 at 730 [35].

24 cf (2025) 99 ALJR 396 at 430 [138], 431 [140]; 421 ALR 376 at 411-412.

25 (2013) 252 CLR 118 at 136 [40], quoting Kelsen, *General Theory of Law and State* (1945) at 160.

reasoning of the majority in *The Commonwealth v AJL20*,²⁶ the officer might have been compelled by a writ of mandamus, issued on an application in the original jurisdiction of this Court conferred by s 75(v) of the *Constitution*, to re-detain the unlawful non-citizen in compliance with the statutory duty imposed by ss 189(1) and 196(1) of the *Migration Act* in accordance with the law as it had been declared in *Al-Kateb*.

28 The Commonwealth does not identify any principled reason as to why the propounded common law defence should be only confined to the tort of false imprisonment,²⁷ can only be relied on by an officer of the executive government of the Commonwealth acting in the purported performance of a statutory duty²⁸ and is only available where the officer acts in conformity with the law as declared in a prior decision of this Court as opposed to another Ch III Court. The Commonwealth seeks to avoid these issues being addressed in this case by stressing the incremental nature of the development of the common law. Whether the propounded common law defence or some version of it might be available to an officer of an executive government in other situations, the Commonwealth argues, need not be examined in the absence of facts making it necessary for such a question to be determined.

29 Finally, the Commonwealth seeks to support its argument by reference to United States and Canadian cases in which courts have denied common law liability for executive action undertaken in good faith in reliance on invalid laws and suggests that a decision of the Court of Appeal of England and Wales supports the same conclusion.

Rejection of the propounded defence

30 The Commonwealth's attempt to enlist support for the propounded common law defence from reasoning in *Stradford* fails as an exercise in analogical common law reasoning. The attempt also fails because of the doctrinal indeterminacy that results from the failure to address the issues noted above. More fundamentally, the Commonwealth's attempt fails at the level of constitutional principle.

26 (2021) 273 CLR 43 at 66 [33]-[34], 72 [48], 73-74 [52]-[53].

27 cf *Deacon v Grimshaw*, reported with *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 104-108.

28 cf *MacDonald v Beare* (1904) 1 CLR 513 at 523-524.

Constitutional Principle

31 The constitutional responsibility of the executive branch of government to ascertain and comply with the law that limits its power is not to be diminished by being characterised as an independent legal duty imposed upon executive officers. The constitutional responsibility exists at the level of constitutional principle as a corollary of the constitutional incapacity of the executive government of a body politic to dispense with obedience to the law.²⁹ "In Australia the absence of a power of executive dispensation of statute law, what Dixon CJ called a 'general constitutional principle', became an aspect of the rule of law and, as Wild CJ put it with respect to New Zealand, is 'a graphic illustration of the depth of our legal heritage'.³⁰

32 The incapacity of the executive government of a body politic to dispense with obedience to the law entails that an officer of an executive government has no power to interfere with or otherwise affect a legal right or interest other than such power as is conferred and limited by law. In the event of an executive officer committing an otherwise tortious act, the officer, like anyone else, "must find his justification, if any, in the common law or in some statutory provision, and it is for the courts of law to determine whether the justification exists".³¹

33 Upon this basis, it can be said to be "a fundamental principle of [our] law that [an officer of an executive government] must be prepared to justify before the ordinary courts the legality of any act which interferes with the person or property of the subject".³² The constitutional responsibility of an officer of an executive government to ascertain and comply with the law that limits the power of the officer is an expression of that principle.

29 *A v Hayden* (1984) 156 CLR 532 at 562, 580; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427-428; *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 281 CLR 525 at 536 [15]-[16].

30 *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348 at 359-360 [13] (footnotes omitted), quoting *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258 and *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622.

31 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 355.

32 Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed (1996) at 404. See also *Eshugbayi Eleko v Government of Nigeria (Officer Administering)* [1931] AC 662 at 670.

34 To recognise the propounded common law defence would be to transform the constitutional responsibility of an officer of the executive government of the Commonwealth to ascertain and comply with the law that limits the power of the officer into a common law immunity from a common law consequence of action which interferes with the person or property of another and which is subsequently judicially determined to have transgressed such a legal limit and therefore to have exceeded that power. To do so would amount to an inversion, if not a perversion, of constitutional principle.

35 The more specific notion that justification for or excuse of an otherwise tortious act on the part of an officer of the executive government of the Commonwealth can be derived as an exercise in analogical common law reasoning from the requirement of s 13(4) of the *Public Service Act* that a Commonwealth employee "must comply with all applicable Australian laws" is contradicted by the plain meaning of that requirement and is inconsistent with the common law principle that "[s]tatutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language".³³

36 Moreover, the notion that protecting an executive officer of the Commonwealth who has acted in the purported performance of a statutory duty to detain in conformity with the law as declared in a prior decision of this Court from liability for a tortious act would enhance the authority of this Court is founded on a misconception of the nature of judicial power, a "hallmark" of which is "the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct".³⁴

37 The critical point is that this Court does not declare the law in the abstract for the future but only ever in the exercise of judicial power as an incident of "the determination of the dispute in hand".³⁵ The law applicable to the determination of disputed rights or obligations will only ever be fully and finally revealed in retrospect.

33 *Coco v The Queen* (1994) 179 CLR 427 at 436. See also *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 587-588 [33].

34 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504, citing *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188. See also Beswick, "Retroactive Adjudication" (2020) 130 *Yale Law Journal* 276 at 286.

35 *Fencott v Muller* (1983) 152 CLR 570 at 609. See also *Clubb v Edwards* (2019) 267 CLR 171 at 217 [136].

38 The point can be illustrated by reference to the scenario postulated by the Commonwealth of an officer who chose in the period after *Al-Kateb* and before *NZYQ* to release from immigration detention an unlawful non-citizen whose removal from Australia under s 198 of the *Migration Act* had no real prospect of becoming practicable in the reasonably foreseeable future then facing an application for a writ of mandamus to compel the officer to re-detain the unlawful non-citizen in compliance with ss 189(1) and 196(1) in accordance with the law as it had been declared in *Al-Kateb*. An issue about the correctness of *Al-Kateb* could have been raised in that scenario on the application for the writ of mandamus and, had the issue then been raised, the question of whether *Al-Kateb* should be reopened and overruled would have arisen for determination then in the same way as that question later arose in *NZYQ*. Had *Al-Kateb* been reopened and overruled in that scenario, as it later was in *NZYQ*, the conduct of the officer in releasing the unlawful non-citizen would have been determined to be compliant with ss 189(1) and 196(1) of the *Migration Act* notwithstanding that the conduct failed to accord with the law as it had been declared in *Al-Kateb* at the time the conduct occurred.

39 To explore the outworking of the scenario in this way is to illustrate that it is in the nature of the judicial process that an issue about the correctness of the law as declared in a prior decision, properly raised in a subsequent proceeding in this Court, necessarily falls to be determined in a subsequent decision of this Court in the course of determining the law applicable to events or conduct that occurred before that subsequent decision. "If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law".³⁶ Yet the propounded common law defence would have the practical effect of doing just that: immunising an executive officer from a common law consequence of having acted in accordance with that which is acknowledged not to be the law.

40 That real difficulties can be encountered by officers of an executive branch of government when "an elaborate enactment of a legislature of limited powers is found to be [invalid] after a substantial period of time during which its provisions have been administered and enforced" must be acknowledged.³⁷ But they are not difficulties of a kind that are encountered only where the administration and enforcement of the law have been in accordance with the law as declared in a prior decision of this Court. Nor are they difficulties of a kind that are uniquely experienced by officers of an executive branch of government. They are "but an

36 *Ha v New South Wales* (1997) 189 CLR 465 at 504.

37 Dixon, "De Facto Officers" (1938) 1 *Res Judicatae* 285 at 285, reproduced in Crennan and Gummow (eds), *Jesting Pilate And Other Papers and Addresses*, 3rd ed (2019) at 212.

impressive example of the general doctrine that when for want of, or excess of, legal power or authority or for non-fulfilment of the conditions required by law, any purported act in the law is invalid, then rights and liabilities are to be ascertained upon the same footing as if the act had not been attempted".³⁸

41 Those difficulties may to some extent be ameliorated by legislation.³⁹ There is, however, no principled basis on which they are to be ameliorated through the development of the common law in the manner for which the Commonwealth contends.

Stradford

42 That the proposed novel common law defence is inconsistent with constitutional principle is reinforced by the reasoning in *Stradford*. Although *Stradford* recognised the difficulties faced by officers executing court orders and warrants that were found to be invalid,⁴⁰ the rationale for affording a degree of protection at common law to those officers was that the "order and underlying process" is judicial⁴¹ and that there is a need to protect the authority of judicial proceedings.⁴² It was observed:⁴³

"The *authority of judicial proceedings* is best served by confirming that the common law affords some protection from civil liability to those who have a legal duty to enforce or execute *orders or warrants* made or issued by a court in judicial proceedings ... To perform their role effectively, courts must have their orders enforced and that must be done by officials

38 *Haskins v The Commonwealth* (2011) 244 CLR 22 at 42 [45], quoting Dixon, "De Facto Officers" (1938) 1 *Res Judicatae* 285 at 285, reproduced in Crennan and Gummow (eds), *Jesting Pilate And Other Papers and Addresses*, 3rd ed (2019) at 212.

39 eg *Military Justice (Interim Measures) Act (No 2) 2009* (Cth), considered in *Haskins v The Commonwealth* (2011) 244 CLR 22.

40 (2025) 99 ALJR 396 at 430 [138]; 421 ALR 376 at 411.

41 *Kable v New South Wales* (2012) 293 ALR 719 at 728 [27], cited in *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396 at 428 [128]; 421 ALR 376 at 408.

42 *Kable v New South Wales* (2012) 293 ALR 719 at 730 [35], cited in *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396 at 428 [128]; 421 ALR 376 at 408.

43 *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396 at 433 [149]; 421 ALR 376 at 415 (emphasis added).

not subject to the unreasonable burden of having to investigate the validity of the orders or warrants presented to them."

43 Thus the protection afforded to the officer by the common law recognised in *Stradford* only arises in relation to the faithful execution of an (invalid) *order* or *warrant* made or issued by a court in the course of quelling disputes about previous conduct or events in the exercise of judicial power. The source of the officer's putative authority is their duty to execute the order itself, not the court's reasoning or conclusion that purportedly justified the order. *Stradford* does not afford protection to actions undertaken by an officer merely on the basis that the reasoning or conclusions of the court support the lawfulness of the officer's actions. Moreover, *Stradford* does not afford the officer any protection in relation to the execution of orders or warrants not issued by a court in the course of a judicial process (such as a search warrant).⁴⁴

44 If accepted, the novel common law defence proposed by the Commonwealth would purport to confer protection on Commonwealth officers for unlawful acts they undertake, not in execution or on the basis of an order or warrant made in the exercise of judicial power, but instead on the basis of this Court's reasons or conclusions about the validity of Commonwealth legislation. That result would purport to confer on this Court's reasons or conclusions an authority they do not possess.⁴⁵ Otherwise the source and scope of the officer's putative authority would not be any court order but the legislation this Court ruled upon, but that legislation is not the outcome of the judicial process. Nothing in the rationale for the protection afforded to officers executing invalid orders or warrants recognised in *Stradford* supports the adoption of a common law defence with those characteristics. Such a defence does not serve to protect the authority of judicial proceedings and it is inconsistent with fundamental principle to contend that the protection of the authority of Parliament requires the recognition of a common law defence for the unlawful acts of the executive. Both the rationale for the common law protection afforded to officers executing invalid orders or warrants made or issued by a court recognised in *Stradford* and the limits placed on that protection in *Stradford* are inconsistent with the Commonwealth's proposed novel common law defence.

44 (2025) 99 ALJR 396 at 429 [131]; 421 ALR 376 at 409-410, referring to *Feather v Rogers* (1909) 9 SR (NSW) 192 at 196-198, 200; *Kable v New South Wales* (2012) 293 ALR 719 at 730 [35].

45 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 275; *R v Governor of Brockhill Prison; Ex parte Evans [No 2]* [2001] 2 AC 19 at 45.

Comparative case law

45 Case law in the United Kingdom contains nothing to indicate to the contrary. The leading case is *R v Governor of Brockhill Prison; Ex parte Evans [No 2]*,⁴⁶ where the House of Lords was unanimous in holding that it was no defence to an action for false imprisonment that the defendant acted in accordance with a judicial interpretation of the law later held to be incorrect.

46 *Percy v Hall*,⁴⁷ an earlier decision of the Court of Appeal of England and Wales, on which the Commonwealth principally relies, was distinguished in *Evans [No 2]*⁴⁸ and has since been explained by the Supreme Court of the United Kingdom in *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department*⁴⁹ to have involved police officers being acknowledged to have acted within the scope of the power of arrest statutorily conferred on them when detaining individuals for offences against bylaws even if those bylaws had subsequently been held to have been invalid. That is to say, *Percy v Hall* can be understood not as a case in which police officers were acknowledged to have had a common law defence to an action for false imprisonment based on their having acted on the presumption that the bylaws were valid but as a case in which the elements of the tort of false imprisonment were not established because the detention pursuant to the statutory power of arrest would have been lawful even if the bylaws had been invalid.

47 Unlike in the United Kingdom, case law in Canada does provide superficial support for the argument of the Commonwealth to the extent that the Supreme Court of Canada has developed in the context of the *Canadian Charter of Rights and Freedoms* a general principle of "qualified immunity" to the effect that where a public official acts reasonably in light of the current state of the law, and it is only subsequently determined that the official's action was unconstitutional, the official will not be liable for damages under s 24(1) of the *Charter* or under the general law of civil liability.⁵⁰ The rationale for that principle has been stated in terms that "good governance requires that public officials carry out their duties

46 [2001] 2 AC 19.

47 [1997] QB 924.

48 [2001] 2 AC 19 at 34-35.

49 [2022] AC 461 at 477 [31]. See also Hickman, "The Consequences of Nullities" (2020) 79 *Cambridge Law Journal* 384 at 385.

50 *Guimond v Quebec (Attorney General)* [1996] 3 SCR 347 at 359 [15]; *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at 441-443 [78]-[79].

under valid statutes without fear of liability in the event that the statute is later struck down".⁵¹

48 However, as is apparent even from that statement of the rationale, the principle of qualified immunity as developed by the Supreme Court of Canada is inextricably linked to the understanding that the power of the Supreme Court to craft constitutional remedies entitles it in an appropriate case to limit the retroactive effect of a declaration of unconstitutionality. That link was made explicit by the Supreme Court in *Canada (Attorney General) v Hislop*⁵² where the qualified immunity was explained to be irreconcilable with a "strict declaratory approach" to constitutional invalidity. The Canadian case law therefore proceeds on a conception of the nature of judicial power that is exercised in constitutional adjudication contradictory to that which prevails in Australia.⁵³

49 As to the case law in the United States, the argument of the Commonwealth seizes on the observation of the Supreme Court of the United States in *Pierson v Ray*⁵⁴ that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does". The Commonwealth points to the recognition by the Supreme Court of a form of "qualified immunity", subsequently expressed in terms that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known".⁵⁵

50 The qualified immunity of government officials that has been recognised by the Supreme Court of the United States is, however, "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial".⁵⁶ However, that qualified immunity from suit has been recognised in a constitutional context within which state and federal governments are entitled to sovereign immunity, and are

51 *Vancouver (City) v Ward* [2010] 2 SCR 28 at 47 [41].

52 [2007] 1 SCR 429 at 471 [102].

53 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

54 (1967) 386 US 547 at 555.

55 *Harlow v Fitzgerald* (1982) 457 US 800 at 818, citing *Procunier v Navarette* (1978) 434 US 555 at 565 and *Wood v Strickland* (1975) 420 US 308 at 322.

56 *Mitchell v Forsyth* (1985) 472 US 511 at 526 (emphasis omitted).

therefore incapable of being subject to civil suit unless that immunity is waived.⁵⁷ Indeed, it has been explained that "[t]he concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity".⁵⁸ The constitutional context for its development being so starkly different,⁵⁹ nothing in the stream of case law in the United States on which the Commonwealth relies can provide more than rhetorical support for its argument.

Conclusion

51 The question reserved in the special case should be determined in the negative.

57 eg *United States v Lee* (1882) 106 US 196 at 204-208.

58 *Scheuer v Rhodes* (1974) 416 US 232 at 239.

59 See Cane, *Controlling Administrative Power: An Historical Comparison* (2016) at 379-388.

52 GORDON J. In 2017, the plaintiff, Mr Abdel-Hady, a citizen of Austria, was detained by an officer of the Commonwealth under s 189(1) of the *Migration Act 1958* (Cth) ("the Act"), which imposed a duty on the officer to detain a person in the migration zone who the officer "knows or reasonably suspects ... is an unlawful non-citizen". Section 196(1) relevantly provided that an unlawful non-citizen detained under s 189 "must be kept in immigration detention until ... he or she is removed from Australia under section 198" of the Act.

53 Mr Abdel-Hady suffers from an aggressive form of thrombophilia, being an extreme tendency to thrombosis. By early February 2024, the parties agreed that, since 28 July 2022, his thrombophilia had rendered him medically unfit to travel by any commercial aeroplane and, consequently, there had been no reasonable prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.

54 In *Al-Kateb v Godwin*, a majority of this Court relevantly held that ss 189(1) and 196(1) of the Act required the continuing detention of an unlawful non-citizen in respect of whom there was no real prospect of removal becoming practicable in the reasonably foreseeable future and, as so applied, those sections did not contravene Ch III of the *Constitution*.⁶⁰ In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, this Court reopened and overruled *Al-Kateb*, deciding that ss 189(1) and 196(1) of the Act were beyond the legislative power of the Commonwealth in so far as they applied to the plaintiff in that case by reason of there being no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.⁶¹ The Commonwealth accepts that, by reason of this Court's decision in *NZYQ*, Mr Abdel-Hady's detention from 28 July 2022 was unlawful.

55 Mr Abdel-Hady seeks damages for false imprisonment in respect of the period in which he was unlawfully detained in immigration detention. In *Queensland v Stradford (a pseudonym)*, this Court held that court officers and other persons obliged to execute or enforce a warrant or judicial order made in judicial proceedings of courts have a defence to the tort of false imprisonment, even if the warrant or order is invalid or set aside for jurisdictional error.⁶² This proceeding concerns whether there is a defence to the tort of false imprisonment, by analogy to the defence recognised in *Stradford*, available to the officer who detained Mr Abdel-Hady and to the Commonwealth, in respect of

60 (2004) 219 CLR 562 at 581 [33], 584 [44], 640 [232], 649-650 [263], 658-660 [290]-[292], 662-663 [303].

61 (2023) 280 CLR 137 at 156 [37], 158 [43], [45], 161-162 [54].

62 (2025) 99 ALJR 396 at 408 [13], 429 [132], 433 [150], 442 [198], 458 [264], 472 [324]; 421 ALR 376 at 381, 410, 415, 427, 448, 467.

Mr Abdel-Hady's unlawful detention. That issue is reflected in the question of law reserved for the opinion of the Full Court:

"Do the Commonwealth and its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?"

56 The Commonwealth accepted that if its officers do not have a defence, then the Commonwealth also does not have a defence and it will be vicariously liable for the unlawful detention by the officers. As a result, the determinative issue is whether officers of the Commonwealth have a defence. For the following reasons, the answer is "no".

57 This case raises issues of fundamental importance concerning the separation of judicial power and the rule of law. The rule of law requires that everyone, including the Executive, obey the law and that, where the Executive exceeds its powers, there must be effective legal remedies.⁶³ The Commonwealth submitted it was immune from liability for Mr Abdel-Hady's wrongful imprisonment because it had been acting in accordance with then-existing authority of this Court. It sought to justify its position by invoking the rule of law, referring to a "deeper duty" on the part of the Executive to comply with the law as declared by this Court. It was said that this "deeper duty" made the present case analogous to the defence recognised in *Stradford*. However, as will be explained, the defence in *Stradford* rested upon fundamentally different principles. The Commonwealth's proposed defence would undermine the redress available to a person where the Executive exceeds its powers.

Facts and background

58 The facts were not in dispute. Mr Abdel-Hady arrived in Australia in 1997 by aeroplane and travelled by aeroplane to and from Australia on 12 different occasions in the period from 1997 to 2006. Mr Abdel-Hady was granted several visas of various classes from 1997 to 2013.

59 On 31 March 2017, a delegate of the Minister for Immigration and Border Protection cancelled Mr Abdel-Hady's visa under s 501(2) of the Act.

⁶³ See, eg, Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215; *Clough v Leahy* (1904) 2 CLR 139 at 155-156; *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 272; *A v Hayden* (1984) 156 CLR 532 at 540, 562, 580; *Enfield City Corporation v Development Assessment Corporation* (2000) 199 CLR 135 at 157 [56]; *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 246 [169].

On 22 August 2017, Mr Abdel-Hady was located and detained by an officer of the Commonwealth pursuant to s 189(1) of the Act.

60 This proceeding was commenced in the original jurisdiction of the Court on 6 May 2021. Mr Abdel-Hady's application for declaratory and other relief in respect of his immigration detention was remitted to the Federal Circuit and Family Court of Australia (Division 2) ("the FCFCOA"). His claim for damages for false imprisonment remained in this Court.

61 On 8 November 2023, this Court made orders in *NZYQ*. Both before and after that date, the parties disputed Mr Abdel-Hady's fitness to travel from Australia to Austria following an episode of thrombophilia in July 2022. On 13 February 2024, Mr Abdel-Hady was granted a Bridging Visa E and released from immigration detention. This occurred because the Commonwealth accepted, having regard to medical assessments that were then available, that from 28 July 2022 there had been no reasonable prospect of Mr Abdel-Hady's removal from Australia becoming practicable in the reasonably foreseeable future. On 4 June 2024, the FCFCOA made declarations by consent to that effect, namely:

- "1. A declaration that:
 - a. throughout the period 28 July 2022 to 13 February 2024 there was no real prospect of removal of [Mr Abdel-Hady] from Australia becoming practicable in the reasonably foreseeable future; and
 - b. on that basis, [Mr Abdel-Hady's] detention during that period was not authorised by ss 189(1) and 196(1) of the [Act].
2. A declaration that [Mr Abdel-Hady] cannot presently be lawfully detained under ss 189 and 196 of the Act on the basis that:
 - a. there is currently not a real prospect of the removal of [Mr Abdel-Hady] from Australia to Austria becoming practicable in the reasonably foreseeable future by any means aside from commercial airliner;
 - b. [Mr Abdel-Hady] is not currently fit for travel to Austria on a commercial airliner;
 - c. there is not a real prospect that [Mr Abdel-Hady] will become fit for travel to Austria on a commercial airliner in the reasonably foreseeable future; and
 - d. there is not a real prospect of the removal of [Mr Abdel-Hady] from Australia to any other country aside from Austria in the reasonably foreseeable future.

21.

3. Note that the declarations made in paragraphs 1 and 2:
- a. do not prevent [Mr Abdel-Hady] being detained under ss 189 and 196 of the Act in the event that changed circumstances mean that there becomes a real prospect of [Mr Abdel-Hady's] removal from Australia becoming practicable in the reasonably foreseeable future;
 - b. do not prevent [Mr Abdel-Hady] from making any claim for damages for false imprisonment either in these proceedings (to the extent the proceedings were not remitted by the High Court to this Court) or in any new proceedings; and
 - c. do not limit the respondents' defence to any claim for damages for false imprisonment brought by [Mr Abdel-Hady] except to the extent that that such defence would be inconsistent with the terms of the declarations."

62 The parties agree that, from the commencement of Mr Abdel-Hady's detention until the Court made orders in *NZYQ*, by reason of this Court's judgment in *Al-Kateb* and s 13(4) of the *Public Service Act 1999* (Cth), which required Australian Public Service employees to "comply with all applicable Australian laws", the Commonwealth's "detaining officers" reasonably understood their duty to be to keep Mr Abdel-Hady in immigration detention until he was actually removed from Australia.

63 In sum, the facts are that Mr Abdel-Hady was detained: (1) by an officer of the Executive Government whose duty to obey the law as declared by this Court was reinforced by the *Public Service Act*; (2) acting pursuant to an apparent statutory duty to detain; (3) during a period of time when current and binding High Court authority held that the duty to detain validly applied to require such detention. These are the facts in respect of which the Commonwealth asks this Court to recognise a novel defence.

Defence in *Stradford*

64 In *Stradford*, the Court recognised a common law defence of justification or an immunity from suit for court officers and other persons obliged to execute or enforce a warrant or judicial order made in judicial proceedings of courts, even if the warrant or order is invalid or set aside for jurisdictional error.⁶⁴ Edelman J

64 (2025) 99 ALJR 396 at 408 [13], 429 [132], 433 [150], 442 [198], 458 [264], 472 [324]; 421 ALR 376 at 381, 410, 415, 427, 448, 467. That defence does not extend to an invalid search warrant issued by a court: *Stradford* (2025) 99 ALJR 396 at 429

explained it as a "defence of justification" based on the legal authority of a judicial order made with jurisdictional error.⁶⁵ The Commonwealth referred to a "defence" rather than an immunity. Describing it as a "defence" or an "immunity" does not affect the answer to the question of law.

65 The defence in *Stradford*, and its underlying rationale, must be understood against the background of Ch III of the *Constitution*. Chapter III entrenches the fundamental constitutional principle of the separation of powers.⁶⁶ The separation of judicial power from executive and legislative power is underpinned by two key rationales (or constitutional values), both of which are well established, and both of which lie at the centre of this case: the separation of judicial power protects liberty against incursions by the legislature or the Executive and it protects the impartiality and independence of the judiciary to ensure that the judiciary can operate effectively as a check on executive and legislative power.⁶⁷ The Court must be cognisant of, and vigilant to protect against, laws that are corrosive of or erode those key rationales or constitutional values underpinning the separation of judicial power, which themselves are conventions of the rule of law.⁶⁸

66 The second key rationale underpinning the separation of powers, the protection of judicial independence, supports an immunity from suit for judicial officers in respect of acts done in their judicial function or capacity.⁶⁹ Judicial immunity is necessary to ensure the independence of judges, in that "being free from actions they may be free in thought and independent in

[131], 439-440 [181], 461 [272]; 421 ALR 376 at 409-410, 423-424, 452. See, eg, *Smethurst* (2020) 272 CLR 177 at 211 [67], 229 [119], 238-239 [148], 256-257 [196], 273-274 [246]-[247].

65 *Stradford* (2025) 99 ALJR 396 at 458 [264]; 421 ALR 376 at 448.

66 See, eg, *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 273; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10-11.

67 *Wilson* (1996) 189 CLR 1 at 11; *Garlett v Western Australia* (2022) 277 CLR 1 at 74 [199]; *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 21 [51]; *EGH19 v The Commonwealth* (2026) 100 ALJR 400 at 420 [71].

68 *Garlett* (2022) 277 CLR 1 at 59 [168], 62-63 [174].

69 *Stradford* (2025) 99 ALJR 396 at 417-418 [74]-[75], 442 [195]-[197], 443-444 [204]-[206], 456 [257]; 421 ALR 376 at 394, 427, 428-429, 446.

judgment",⁷⁰ and "may act fearlessly and without the harassing concern that they will be made personally liable for the performance of their functions before another judge at the suit of a person disgruntled by the decision".⁷¹ As Gleeson CJ explained in *Fingleton v The Queen*, "the public interest in maintaining the independence of the judiciary requires security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions".⁷²

67 The officers in *Stradford* were acting in accordance with an exercise of judicial power, in the form of a judicial warrant or order.⁷³ As has been explained, the judiciary occupies a unique position in the branches of government. Consistently with the constitutional separation of powers, the judiciary requires institutional protections to ensure it can operate effectively as a check on the legislature and Executive.

68 The defence in *Stradford* is best understood as an extension or logical consequence of the judicial immunity itself: as applied in *Stradford*, the judicial immunity had the effect that acts of the judge that would otherwise have been unlawful were lawful, and that, as a consequence, the acts of the officials enforcing the judicial order or warrant were also lawful.⁷⁴ Treating the acts of the officials as lawful was a necessary consequence of the need for the orders of the court to be obeyed. It is necessary for the orders of the court to be obeyed by officers of the court who are the means of completing the administration of justice by quelling a dispute. As Edelman J explained in *Stradford*, "[i]f a judicial order, made with jurisdictional error, nevertheless has sufficient authority to provide a defence of justification for the judicial officer who made the order then, a fortiori, it ought to have sufficient authority to provide the same defence of justification for any person who is bound to take action in accordance with the order".⁷⁵ The officers' defence

70 *Garnett v Ferrand* (1827) 6 B & C 611 at 625-626 [108 ER 576 at 581].

71 *Yeldham v Rajski* (1989) 18 NSWLR 48 at 52. See generally *Stradford* (2025) 99 ALJR 396 at 443-444 [204]-[208]; 421 ALR 376 at 428-429.

72 (2005) 227 CLR 166 at 186 [39].

73 See, eg, *Stradford* (2025) 99 ALJR 396 at 409 [26]-[28], 436 [162]; 421 ALR 376 at 383-384, 418.

74 *Stradford* (2025) 99 ALJR 396 at 442 [198]; 421 ALR 376 at 427.

75 (2025) 99 ALJR 396 at 458 [264]; 421 ALR 376 at 448.

can therefore be seen to serve the same rationale as the judicial immunity itself: the maintenance of the impartiality and independence of the judiciary.⁷⁶

69 In *Stradford*, the plurality framed the rationale for the defence in terms of judicial authority and the role of the courts. Their Honours referred approvingly⁷⁷ to the statement of Allsop P in *Kable v New South Wales*⁷⁸ that the protection afforded by the principle was "rooted in the order and underlying process being judicial" and an aspect of the "protection of the authority of judicial proceedings".⁷⁹ Allsop P also described the principle as "referable to the exercise of judicial acts".⁸⁰ Indeed, in *Kable*, Allsop P declined to extend any defence to an order of a court which the Court of Appeal of New South Wales considered to be non-judicial in nature.⁸¹ As the plurality observed in *Stradford*, to "perform their role effectively, courts must have their orders enforced and that must be done by officials not subject to the unreasonable burden of having to investigate the validity of the orders or warrants presented to them".⁸²

70 To the extent that the plurality's references to judicial authority were concerned with protecting judicial independence, which is required by the separation of powers, their Honours' reasoning is consistent with a view that the defence serves the same purpose as the judicial immunity itself. In any event, the common thread of the reasoning in *Stradford* was a recognition that the source of the purported authority under which the officers were acting was judicial.⁸³

Proposed defence sought by the Commonwealth

71 The Commonwealth asks this Court to recognise a novel defence, by analogy to the defence in *Stradford*, where a plaintiff was detained: (1) by an officer of the Executive Government whose duty to obey the law as declared by

76 *Stradford* (2025) 99 ALJR 396 at 443-444 [204]-[206]; 421 ALR 376 at 428-429.

77 *Stradford* (2025) 99 ALJR 396 at 428 [128]; 421 ALR 376 at 408.

78 (2012) 293 ALR 719 at 728 [27], 730 [35].

79 *Stradford* (2025) 99 ALJR 396 at 428 [128], see also 433 [148]; 421 ALR 376 at 408, see also 415.

80 *Kable* (2012) 293 ALR 719 at 729 [32].

81 (2012) 293 ALR 719 at 733-734 [48], 735 [57]; see also 757-758 [152]-[153].

82 (2025) 99 ALJR 396 at 433 [149]; 421 ALR 376 at 415.

83 (2025) 99 ALJR 396 at 428 [128], 429 [132], 442 [195]-[198], 458 [264], 472 [324]; 421 ALR 376 at 408, 410, 427, 448, 467.

this Court was reinforced by the *Public Service Act*; (2) acting pursuant to an apparent statutory duty to detain; and (3) during a period of time when current and binding authority of this Court held that the duty to detain validly applied to require such detention. The Commonwealth submitted that the principled basis for the defence recognised and applied in *Stradford* warrants the conclusion that an analogous defence applies where detention occurs because an officer acts in accordance with an incorrect determination by this Court of the validity of a legislative duty to detain.

72 The Commonwealth identified two propositions that it said underpinned the decision in *Stradford*, which were said to "resonate[]" in ascertaining the appropriate common law principle applicable" in this case.⁸⁴ The *first* was that officers can be subject to a legal duty to detain arising from their general obligation to enforce orders made by a court, even if the particular orders they are called upon to enforce are invalid. This proposition was said to apply in this case because the detaining officer was under a legal duty to detain Mr Abdel-Hady, notwithstanding that *NZYQ* subsequently revealed that ss 189(1) and 196(1) were invalid in their application to him during the relevant period. In the Commonwealth's submission, that duty arose from the obligation of the Executive to obey the law as the court has declared it to be, reinforced by the statutory system of public service discipline⁸⁵ to which the detaining officer was subject.

73 The *second* was that holding detaining officers liable for acting in accordance with their duty to detain would undermine the authority of judicial proceedings and create unfairness and incoherence in the law. The Commonwealth submitted that there is manifest injustice and incoherence in recognising the legal duty of officers of the Executive to obey a statute that this Court has held to be valid, only to hold those officers personally liable for having complied with that duty in the event the Court decides to overrule its earlier decision.

74 The short answer to the Commonwealth's submissions is that those propositions were necessary steps to the conclusion reached in *Stradford*, but not sufficient. As has been explained, the defence recognised in *Stradford* was grounded in the purported source of the authority being judicial, and derivative of the judicial immunity, which serves a range of purposes in regard to judicial independence and the finality of litigation. Once the underpinning of the defence in *Stradford* is understood in those terms, the matters identified by the Commonwealth are not sufficient to sustain a defence in the terms it seeks. The rationale in *Stradford* – whether expressed as the protection of judicial

84 *Stradford* (2025) 99 ALJR 396 at 428 [128]; 421 ALR 376 at 408.

85 *Public Service Act*, ss 13, 15(1). See generally *Stradford* (2025) 99 ALJR 396 at 433 [147]; 421 ALR 376 at 414.

independence or judicial authority – does not support extending the defence recognised in that case to public officials acting in accordance with the prevailing view of the law, even a view pronounced by this Court, more generally.

75 It may be accepted that an underlying concern justifying the defence recognised in *Stradford* is the "difficulty that court officers, who are bound to execute orders or warrants, would face if they were required to investigate whether the orders or warrants were valid".⁸⁶ That concern, by analogy, might equally apply to officers bound to execute Commonwealth laws. However, in the latter case, the source of the officers' duty is a legislative command, not a judicial order. There is no established institutional need to protect the Parliament, its independence or its authority by reference to its role or function that would justify the creation of a defence available to officers performing a statutory duty. Rather, it is understood that Parliament may exceed its power, and it is the role of the court to act as a check on that power.

76 This Court has consistently held that acts performed by the Executive in reliance on an unconstitutional statute may give rise to civil liability.⁸⁷ The existence of a judgment of this Court confirming the constitutional validity of a statutory duty does not change this position. Reasons for decision which confirm the constitutional validity of a law, or interpret the operation of a law, are – unlike a judicial order or warrant – not a judicial command. Although the orders of a court are, in many cases, valid until they are set aside,⁸⁸ the same is not true of its reasons. As Lord Hobhouse explained in *R v Governor of Brockhill Prison, Ex parte Evans [No 2]*, "any legal decision is no more than evidence of the law ... [Decisions of courts] are a source of law but not a conclusive source ... They are not statutes which ... have an absolute and incontrovertible status."⁸⁹ The Court's decision in *Al-Kateb* simply declared the law as understood at the earlier time, or "record[ed]"

86 *Stradford* (2025) 99 ALJR 396 at 431 [140]; 421 ALR 376 at 412.

87 See, eg, *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 341-342; *James v The Commonwealth* (1939) 62 CLR 339 at 362; *McClintock v The Commonwealth* (1947) 75 CLR 1 at 19; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 230-231; *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 99; *Deacon v Grimshaw*, reported with *Antill Ranger* (1955) 93 CLR 83 at 104-108. See generally Pannam, "Tortious Liability for Acts Performed under an Unconstitutional Statute" (1966) 5 *Melbourne University Law Review* 113.

88 *New South Wales v Kable* (2013) 252 CLR 118 at 135 [38]; *Stradford* (2025) 99 ALJR 396 at 438-439 [177]; 421 ALR 376 at 422.

89 [2001] 2 AC 19 at 45.

the perception" of the law as then current.⁹⁰ It represented evidence of the law.⁹¹ It did not alter the source of the duty to detain in this case, which was, at all times, statutory.

77 In sum, the facts of this case do not fall within the common law defence identified in *Stradford*: the detaining officer was not complying with a court order, but rather the applicable statutory duty to detain, whose constitutional validity had been upheld by this Court in *Al-Kateb*. As we have seen, unlike the defence recognised in *Stradford*, the proposed novel defence is not necessary to protect the authority of judicial proceedings or judicial independence.⁹² But there are other difficulties with the proposed defence. First, it would be inconsistent with the constitutional role of courts and the rule of law. Second, although not recognising the defence would result in some unfairness to the detaining officer, that must be weighed against the manifest unfairness of Mr Abdel-Hady being deprived of a remedy for his false imprisonment. Third, the novel defence is incoherent with the principled basis for the tort of false imprisonment. Fourth, the "confines" of the Commonwealth's proposed defence reveal its artificiality. Finally, the overseas authorities relied on by the Commonwealth did not justify recognising the proposed defence.

Constitutional role of courts

78 The question underlying the Commonwealth's proposed defence is whether the existence of prevailing authority of this Court – which held that ss 189(1) and 196(1) of the Act validly authorised the detention of a person in Mr Abdel-Hady's circumstances – supplies a defence to the detaining officer and the Commonwealth.

79 An immediate obstacle for this argument is that, when this Court decided *NZYQ*, overturning its prior decision in *Al-Kateb*, that decision did not operate only prospectively. The Court's decision in *NZYQ* did not produce the invalidity of ss 189(1) and 196(1) to the extent that they purported to authorise the detention of an unlawful non-citizen where there was no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future. As explained

90 *Giannarelli v Wraith* (1988) 165 CLR 543 at 584. See also *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 275.

91 *Giannarelli* (1988) 165 CLR 543 at 584; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 452.

92 See [66]-[70], [74]-[75] above.

by Latham CJ in *South Australia v The Commonwealth* ("the *First Uniform Tax Case*"):⁹³

"Common expressions, such as: 'The courts have declared a statute invalid,' sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour – but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it – and thereafter invalid. If it is beyond power it is invalid *ab initio*."

80 Put another way, the effect of the Court's decision in *NZYQ* was that ss 189(1) and 196(1) had *at no time* authorised the detention of a person in Mr Abdel-Hady's circumstances. The decision in *NZYQ* did not produce this effect; correspondingly, the decision in *Al-Kateb* did not negate the effect.

81 Taking the Commonwealth's argument at its highest, a detaining officer may have felt some safety in the Court's decision in *Al-Kateb* in proceeding (or continuing) to detain a person in Mr Abdel-Hady's circumstances. They were relying on existing precedent. However, precedent "is the best evidence of the law as enacted but it is not the enacted law".⁹⁴ The enacted law did not validly authorise Mr Abdel-Hady's detention, and so the detention was unlawful.⁹⁵

82 Despite its acceptance of this position, the Commonwealth submitted that the detaining officers should have the benefit of a defence that, in effect, allows them to rely on *Al-Kateb* as representing the correct state of the law until *NZYQ* was decided. In effect, this would mean that, as far as the civil liability of those detaining officers is concerned, *NZYQ* *does* only operate prospectively. For Mr Abdel-Hady, it recognises that his detention was unlawful but deprives him of any redress for the period of his unlawful imprisonment. The Commonwealth's submission would, in that way, deprive *NZYQ* of part, if not all, of its retrospective effect. "If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not

93 (1942) 65 CLR 373 at 408. See also *Ha v New South Wales* (1997) 189 CLR 465 at 503-504, 515.

94 *John* (1989) 166 CLR 417 at 452.

95 *NZYQ* (2023) 280 CLR 137.

to be the law."⁹⁶ Yet that is effectively the result the Commonwealth seeks to achieve.

83 The fact that judicial decisions do not only operate prospectively is a key element of the separation of powers and the constitutional role of courts. As explained in *Ha v New South Wales*:⁹⁷

"A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations."

84 For a court to treat its decisions as only operating prospectively would be inconsistent with its constitutional role; it would be adopting a legislative role by deciding what the law shall be for others in the future.⁹⁸

85 The *Constitution* informs the development of the common law, and the development of the common law cannot run counter to constitutional imperatives.⁹⁹ That the proposed defence sits in tension with key constitutional principles concerning the nature of judicial power and the constitutional role of courts reinforces the conclusion that the proposed defence must not be adopted.

Rule of law

86 There is a further, and fundamental, issue with the Commonwealth's proposed defence – its implications for the rule of law. As already noted, the Commonwealth developed its proposed defence in the hearing by reference to what it described as a "deeper duty arising from the rule of law requirement that the Executive comply with the law as it has been declared by this Court".

96 *Ha* (1997) 189 CLR 465 at 504; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 353-354 [55]-[56].

97 (1997) 189 CLR 465 at 503-504 (footnotes omitted).

98 *Evans [No 2]* [2001] 2 AC 19 at 48.

99 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566, especially at 566; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 220 [20]; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [44].

87 In this context, both the Commonwealth and Mr Abdel-Hady referred to Latham CJ's remarks in the *First Uniform Tax Case* that anybody is entitled to disregard a law made in excess of power. The Commonwealth submitted that the position may well be different for the Executive, particularly where this Court has declared the meaning and proper content of a law of the Parliament. It referred to *Federal Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd*, in which the Full Court of the Federal Court of Australia was critical of an approach taken by the Commissioner which appeared to administer the relevant law in a way known to be contrary to how the Federal Court had declared the meaning of that statute.¹⁰⁰ The Commonwealth submitted that its proposed defence would at least find expression where this Court (being a Full Court of this Court, rather than a single Justice) has "authoritatively" answered a question.

88 It is uncontroversial that the Executive has a duty to obey the law.¹⁰¹ The principle that government officials are not exempt from the duty of obedience to the law which governs other citizens was a core component of Dicey's exposition of the rule of law.¹⁰² However, the Commonwealth's argument sought to turn a duty to obey the law into an immunity from liability for breaching the law. As Mr Abdel-Hady submitted, the rule of law is vindicated, not compromised, by saying that, in the absence of authority, that which you cannot do except with authority is a legal wrong. It would run contrary to the rule of law for the Executive or its officers to be exempted from liability for detention which was, at all times, unauthorised.

89 The Executive does not have some "*deeper* duty" to comply with the law when any court, or this Court, has determined that law to be valid or has determined the interpretation of that law; nor does it have any *lesser* duty to comply before a court has pronounced on the validity or interpretation of that law. The unacceptable consequence of the Commonwealth's argument would be different standards of the rule of law where: (a) Parliament has enacted a statute whose validity has not yet been considered by any court; (b) Parliament has enacted a statute whose validity has been considered by a court other than a Full Court of this Court; and (c) Parliament has enacted a statute whose validity has been considered by a Full Court of this Court.

100 (2007) 158 FCR 325 at 326 [1], 326-327 [3]-[6], 347-348 [47]-[48]. See also *The Commonwealth v AJL20* (2021) 273 CLR 43 at 73-74 [52].

101 See, eg, *The Commonwealth v New South Wales* (1923) 32 CLR 200 at 214, citing *Eastern Trust Co v McKenzie, Mann & Co Ltd* [1915] AC 750 at 759; *Smethurst* (2020) 272 CLR 177 at 246 [169].

102 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215.

90 The *Constitution* does not permit of different grades or qualities of justice as between different courts.¹⁰³ The duty of the Executive could not be made contingent on whether a court has ruled on the validity of a statute or, alternatively, on the nature of the court that *has* ruled on the validity of a statute. As has been explained, at all times the (putative) source of the duty to detain was statutory.

Unfairness

91 The Commonwealth contends that to hold a detaining officer liable for false imprisonment where this Court had previously considered the detention to be authorised would introduce unfairness in the law, since the officer was under a legal duty to detain Mr Abdel-Hady.

92 It may be accepted that a result of not recognising the novel defence is that the detaining officer is personally liable despite having had no real choice but to detain Mr Abdel-Hady. The detaining officer is, in that sense, blameless. The result might, from that perspective, appear unreasonable.¹⁰⁴

93 Further, having regard to the observations of the Full Federal Court in *Indooroopilly*,¹⁰⁵ without its proposed defence, the Executive is placed in the undesirable position of having been bound to administer the law whose validity was confirmed in *Al-Kateb* before it was overturned, while also being liable for having done so once the decision was overturned.

94 On the other hand, recognising the proposed defence would result in manifest unfairness to Mr Abdel-Hady: despite having been unlawfully detained, he would not be entitled to any compensation so as to vindicate his right to liberty. Leaving Mr Abdel-Hady without a remedy for a substantial period of unlawful imprisonment is also unfair and highly undesirable.

95 In weighing these two kinds of unfairness, it is relevant that, at least in this case, the Commonwealth has accepted that it will be vicariously liable for the conduct of the detaining officer, who was employed by the Commonwealth and detained Mr Abdel-Hady pursuant to a statutory power then seen to support the detention in the course of his employment.¹⁰⁶ In any event, given that the result may be cast as unfair from either perspective, ultimately considerations of fairness

103 cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103.

104 cf *Evans [No 2]* [2001] 2 AC 19 at 26.

105 (2007) 158 FCR 325 at 326-327 [3], 347-348 [47].

106 cf *Enever v The King* (1906) 3 CLR 969; *Baume v The Commonwealth* (1906) 4 CLR 97 at 110.

do not overcome the lack of a principled justification for the Commonwealth's proposed defence.

Rationale for tort of false imprisonment

96 The rationale underlying the tort of false imprisonment supports the view that the Court should be reluctant to expand the scope of any defences.

97 False imprisonment, by interfering with a plaintiff's person and liberty, constitutes "prima facie a grave infringement of the most elementary and important of all common law rights".¹⁰⁷ The tort has played a fundamental role, alongside the writ of habeas corpus, through the centuries in protecting the basic liberties of individuals against excesses of state power and may in that regard be considered a "constitutional safeguard[]".¹⁰⁸

98 False imprisonment has been described as a tort of strict liability, reflecting that "the focus of this civil wrong is on the vindication of liberty and reparation to the victim, rather than upon the presence or absence of moral wrongdoing on the part of the defendant".¹⁰⁹ In that sense, "the strict theory of civil liability is not inconsistent with the fact that in certain circumstances the harm complained of may have been inflicted justifiably".¹¹⁰

99 The importance of the right vindicated by the tort of false imprisonment tends against the recognition of a defence in the terms sought by the Commonwealth. As Lord Hope observed in *Evans [No 2]*, the "defence of justification must be based upon a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful".¹¹¹ Acceptance of the Commonwealth's argument would erode the protection currently offered by the tort.

107 *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

108 *Evans [No 2]* [2001] 2 AC 19 at 43. See also *Balkin & Davis Law of Torts*, 6th ed (2021) at 88 [3.29].

109 *Ruddock v Taylor* (2005) 222 CLR 612 at 650 [140]. See also *Google LLC v Deferos* (2022) 277 CLR 358 at 431 [202]; *Evans [No 2]* [2001] 2 AC 19 at 26-28, 32, 35.

110 *Evans [No 2]* [2001] 2 AC 19 at 32.

111 [2001] 2 AC 19 at 35.

Confines of proposed defence reveal its unstable basis and artificiality

100 The Commonwealth resisted attempts to define the possible outer boundaries of the proposed defence by reference to the common law method of proceeding no further than necessary to determine the particular legal right or liability in controversy between the parties.¹¹² It submitted that this case was the paradigm for when the defence would apply, and that the Court could, in a future case, decide not to apply it to a different set of circumstances. However, an analysis of the outer boundaries of the proposed defence illustrates that it is wholly artificial to confine its application to a particular set of facts. It is necessary to consider the implications of the Commonwealth's reasoning.

101 It is axiomatic that the common law develops incrementally. That does not mean, however, that the development of the common law excludes consequentialist reasoning. To the contrary, consideration of the consequences of developing the common law is a key aspect of that development. Even incremental steps require implicit reference to general principles.¹¹³

102 The proposed defence is in confined terms, being applicable in circumstances where a plaintiff was detained (i) by an officer of the Executive Government whose duty to obey the law as declared by this Court was reinforced by the *Public Service Act*; (ii) acting pursuant to an apparent statutory duty to detain; and (iii) during a period of time when current and binding authority of this Court held that the duty to detain validly applied to require such detention.

103 However, the principles on which the Commonwealth sought to base its proposed defence apply far more widely. Properly analysed, the "confines" of the Commonwealth's proposed defence demonstrate that it is artificial only to consider its application in this case.

104 First, in so far as the rationale for the proposed defence is the protection of detaining officers against unfairness and the importance of detaining officers complying with legal obligations, the existence of authority suggesting the duty to detain validly applied to require such detention does not make the situation relevantly different from a case where there is not such relevant authority. As has been explained, the source (or purported source) of the duty to detain was, at all times, ss 189(1) and 196(1) of the Act. The Court's decision in *Al-Kateb* did not change this position.

112 See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [58].

113 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 630-631 [316]-[317].

105 Second, as a matter of principle, the fact that the source of the authority was
this Court does not make the situation relevantly different from a case in which
the source of authority is any lower court. The Commonwealth submitted that
the rule of law responsibilities of the Executive when faced with decisions of lower
courts with which it disagrees may well be different to those that arise when this
Court has "authoritatively" answered a question. As has been explained,
the Executive has no deeper duty to act in accordance with the rule of law when
this Court makes a decision. In *Indooroopilly*, the Full Federal Court's criticism
was directed towards a submission by the Commissioner that it was not compelled
to follow a line of single-judge decisions of the Federal Court.¹¹⁴

106 The Commonwealth also accepted that the elements of the proposed
defence "may well be capable of being generalised to other kinds of torts",
and the principles underlying the defence might also apply to other common law
claims, such as a claim for money had and received.

107 The effect of the Commonwealth's submission was to artificially confine its
proposed defence to what it described as a paradigmatic case. However, it could
not identify any stable boundaries of the defence or show how it might properly be
confined (other than to say that the Court did not need to decide those boundaries).
Rather, it accepted that the defence likely had a wider, but unknown, scope of
application. The Commonwealth did not even disavow the contention that
the defence might apply to acts performed before a court has ruled upon
the validity of a statute, which would run contrary to the established principle in
this country that acts performed by the Executive in reliance on an unconstitutional
statute may give rise to civil liability.

108 In reality, the proposed defence is akin to a "foot in the door" to a far more
wide-ranging defence, which would significantly undermine the ability of a person
to obtain redress where the Executive exceeds its authority. That door should
remain closed.

Overseas authorities do not support proposed defence

109 The Commonwealth also relied on the existence of defences or immunities
recognised by the courts in the United Kingdom, Canada and the United States of
America. They do not assist.

110 The Commonwealth relied upon the decision of the Court of Appeal of
England and Wales in *Percy v Hall*,¹¹⁵ which involved constables who had made
arrests for breach of certain byelaws. The Court of Appeal held that the byelaws

114 (2007) 158 FCR 325 at 346-348 [44]-[47]; see also 326-327 [3].

115 [1997] QB 924.

were valid, but had they been invalid, the constables would have had a defence of lawful justification where the byelaws were apparently valid, were in law to be presumed valid, and in the public interest needed to be enforced.¹¹⁶

111 However, *Percy* was distinguished by the House of Lords in *Evans [No 2]*. In *Evans [No 2]*, the applicant was convicted of offences and sentenced to concurrent terms of imprisonment. A statutory regime allowed the period she spent in custody to be reduced to some extent to give effect to periods spent in custody before trial or sentence. The discount was to be applied by the governor of the institution responsible for detaining the applicant.¹¹⁷ The governor calculated the discount based on a Home Office explanation of the legal position of prisoners in the position of the applicant. The Home Office's view was founded on a line of Divisional Court decisions, which were then overruled by the Divisional Court on application by the applicant,¹¹⁸ with the result that she had been kept in prison for 59 days longer than she should have been.¹¹⁹

112 The House of Lords unanimously held that the governor could not rely upon his compliance with the law as the court then said it was. Their Lordships did not consider that the governor could escape liability on the basis that he had acted in accordance with a view of the law which at the time was accepted by the courts as being correct.¹²⁰ As Lord Slynn observed:¹²¹

"Despite sympathy for the governor's position it seems to me that the result is clear. [The applicant] never was lawfully detained [after the date on which she should have been released]. *She was merely thought to be lawfully detained.* That is not a sufficient justification for the tort of false imprisonment even if based on rulings of the court."

113 Lord Hope specifically distinguished the case from one in which a "defence of justification is advanced on the ground that the alleged tortfeasor was acting within the four corners of a warrant issued which had been issued to him by

116 *Percy* [1997] QB 924 at 947.

117 *Evans [No 2]* [2001] 2 AC 19 at 30-31.

118 *Evans [No 2]* [2001] 2 AC 19 at 27, discussing *R v Governor of Brockhill Prison; Ex parte Evans* [1997] QB 443.

119 *Evans [No 2]* [2001] 2 AC 19 at 27.

120 *Evans [No 2]* [2001] 2 AC 19 at 26-29, 33-35, 43, 47.

121 *Evans [No 2]* [2001] 2 AC 19 at 26 (emphasis added).

the court" (in other words, the defence recognised in *Stradford*).¹²² Lord Hope considered that *Percy* was distinguishable on the basis that the constables "were seeking to enforce the byelaws in the reasonable belief that a byelaw offence was being committed".¹²³ The Court of Appeal in *Percy* considered that, in that case, the legislative provision under which the arrests were made offered protection to the constables making an arrest where they honestly (albeit mistakenly) believed on reasonable grounds the person was committing a stipulated offence.¹²⁴

114 For those reasons, *Percy* does not relevantly assist the Commonwealth in this case. The Commonwealth's proposed defence is not concerned with the actions of constables or police officers in making an arrest.¹²⁵ In any event, there is a stronger analogy between this case and the later decision of the House of Lords in *Evans [No 2]*, where the actions of the Executive were founded upon the state of judicial authority that existed at the time.

115 The Commonwealth also referred to two principles in the United States and Canada supporting a form of immunity for executive officers enforcing a law found to be invalid or unconstitutional. First, in the United States a "qualified immunity" protects government officials performing "discretionary functions" from a damages action "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known".¹²⁶ The existence of this immunity can be traced back to *Pierson v Ray*, in which the Supreme Court of the United States suggested that a police officer might be excused from liability for "acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied".¹²⁷ As the Court explained, "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does".¹²⁸

122 *Evans [No 2]* [2001] 2 AC 19 at 33; see also 35.

123 *Evans [No 2]* [2001] 2 AC 19 at 35.

124 [1997] QB 924 at 943-945.

125 It may be queried whether an arrest made in reliance upon an unconstitutional offence is lawful: *Coleman v Power* (2004) 220 CLR 1 at 62-64 [140]-[144].

126 *Harlow v Fitzgerald* (1982) 457 US 800 at 818.

127 (1967) 386 US 547 at 555.

128 (1967) 386 US 547 at 555.

116 Second, in Canada, there is a principle of public law to the effect that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional".¹²⁹ The principle applies to civil law liability as well as liability under the *Canadian Charter of Rights and Freedoms*.¹³⁰ The Commonwealth referred to *Guimond v Quebec (Attorney General)*, in which the respondent had been imprisoned for default of payment of fines. He spent 49 days in prison and, upon his release, sought to claim damages both at common law and under the *Charter* for what he alleged was the constitutional invalidity of his detention. The Court considered the facts did not warrant a departure from the "general rule".¹³¹

117 As the Commonwealth acknowledged, the defences or immunities existing in the United States and Canada are in a much wider form than the "confined" defence contended for by the Commonwealth. Recognition of a wide defence to government liability for acts performed in reliance upon an unconstitutional or invalid statute is not a step that should be taken in this country. It is contrary to both principle and authority. It suffices to acknowledge that the doctrines in the United States and Canada are founded upon their respective and different legal¹³² and constitutional contexts¹³³ and need not be adopted here.

129 *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at 441-442 [78], citing *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg* [1971] SCR 957 and *Central Canada Potash Co Ltd v Government of Saskatchewan* [1979] 1 SCR 42; *Guimond v Quebec (Attorney General)* [1996] 3 SCR 347 at 359 [15].

130 *Mackin* [2002] 1 SCR 405 at 442 [79].

131 *Guimond* [1996] 3 SCR 347 at 360 [19].

132 See, eg, *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 at 471 [102].

133 See, eg, *Scheuer v Rhodes* (1974) 416 US 232 at 239-240; *Hislop* [2007] 1 SCR 429 at 471 [102].

Conclusion

118 The question of law stated for the opinion of the Court should be answered as follows:

Do the Commonwealth and its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?

Answer: No.

EDELMAN J.

Introduction: a new immunity from liability for false imprisonment for the Executive and body politic?

119 During the relevant period in 2022 and 2023, an officer of the Commonwealth Executive detained Mr Abdel-Hady. The officer did so consistently with what had been held by this Court in *Al-Kateb v Godwin*¹³⁴ to be the meaning and required application of provisions of the *Migration Act 1958* (Cth).¹³⁵ In November 2023, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,¹³⁶ this Court overturned the decision in *Al-Kateb* and held that the provisions of the *Migration Act* did not validly authorise officers to detain people in the position of Mr Abdel-Hady. The consequence of the decision in *NZYQ* is that the relevant provisions of the *Migration Act* were disapplied to the extent that they purported to authorise the detention of persons such as Mr Abdel-Hady.

120 This special case is concerned with Mr Abdel-Hady's claim of false imprisonment. The tort of false imprisonment is a tort of strict liability. Liability is imposed, subject to defences, for a person's action which intentionally deprives another of their liberty no matter how honest the person's belief in their entitlement to act and no matter how reasonable the action.¹³⁷ The effect of the decision in *NZYQ* is that there can be no justification defence to the tort of false imprisonment of Mr Abdel-Hady based on statutory authority from ss 189(1) and 196(1) of the *Migration Act*. It is properly common ground that the decision in *NZYQ* has retroactive effect.

121 The essential issue in this special case concerns a novel proposed defence to false imprisonment raised by the officer, and the Commonwealth of Australia as a body politic (in short, "the Commonwealth"). That proposed new defence is in the nature of an immunity from liability for false imprisonment for the officer and the Commonwealth based on the fact that the officer's action, whether known to them or not and whether in good faith or not, was consistent with the reasoning, which was still authoritative at the time of Mr Abdel-Hady's detention, of a majority of this Court in *Al-Kateb*.

122 It has been cogently observed of immunities as public policy defences that they can be "particularly odious since they are liable to create the impression that

134 (2004) 219 CLR 562.

135 *Migration Act 1958* (Cth), ss 189(1), 196(1).

136 (2023) 280 CLR 137.

137 See *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at 381 [115].

the law is guilty of favouritism" and that "a defendant who asks the courts to forge a new public policy defence or extend the reach of an existing one will generally be fighting an uphill battle".¹³⁸ The recognition in this case of such a novel immunity would result in different treatment of the Commonwealth and officers of the Executive on the one hand and all other persons on the other. The former would be immune from liability for false imprisonment if acting upon a mistaken understanding of the law but the latter would not. That different treatment would be inconsistent with the Diceyan principle of legal equality of all persons under the law. All persons are required to comply with the law in its proper application to their conduct as well as with orders and commands of the courts. Absent statutory authority to do so, there is no basis in these circumstances to treat the Commonwealth or officers of the Executive any differently from other people by conferring a special immunity upon the Commonwealth or officers of the Executive to infringe the liberty of others.

123 The detaining officer was not a party to, or the privy of a party to, the decision in *Al-Kateb*. It has been recognised for centuries that, as precedents for similar cases, decisions on the common law or on the interpretation or valid application of legislation establish norms from which non-parties can ascertain the law that applies to their circumstances.¹³⁹ Using the language of "evidence" to describe the norms created by judicial decisions, Blackstone said that "it sometimes may happen that the judge may *mistake* the law ... the decisions of courts of justice are the evidence of what is common law".¹⁴⁰ Or, as Lord Mansfield expressed the point, "precedent, though it be evidence of law, is not law in itself; much less the whole of the law".¹⁴¹ In the case of the reasoning in *Al-Kateb*—that ss 189(1) and 196(1) of the *Migration Act* validly required the detention of a person in the position of Mr Abdel-Hady—that judicially created norm did not correctly reflect the law that should be applied to Mr Abdel-Hady. On the correct application of the legal position, the officer wrongly detained Mr Abdel-Hady.

124 At the heart of the Commonwealth's submissions was the decision of this Court last year in *Queensland v Stradford (a pseudonym)*.¹⁴² In *Stradford*, this Court held that there was no liability for any of the following based on the

138 Goudkamp, *Tort Law Defences* (2013) at 137-138.

139 Hale, *The History and Analysis of the Common Law of England* (1713) at 68; *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 45.

140 Blackstone, *Commentaries on the Laws of England* (1765), bk 1 at 71 (emphasis in original).

141 *Jones v Randall* (1774) Lofft 383 at 385 [98 ER 706 at 707].

142 (2025) 99 ALJR 396; 421 ALR 376.

detention of Mr Stradford: (i) the judge of the Federal Circuit Court of Australia who made the order to detain and who issued the warrant; (ii) the police and correctional officers who were commanded to execute the warrant; and (iii) the guards who were directed by the judge to escort Mr Stradford to a courthouse cell pending execution of the warrant. The Commonwealth in the present case essentially submitted that if judges, police, correctional officers, and guards were immune from liability where their acts were honest attempts at compliance with the existing law then the same should be the case for officers who enforce the law under the *Migration Act*.

125 The question in the special case can only be coherently answered by appreciating that the absence of liability for the judge, the police, the correctional officers, or the guards in *Stradford* has nothing to do with an immunity. Their absence of liability arises because, despite the antique, outdated, and unjustifiable description of the Federal Circuit Court as "inferior", the court order upon which each of those persons relied was not wholly void or invalid. By contrast, the relevant provisions of the *Migration Act* had no valid application to Mr Abdel-Hady. Further, neither Mr Abdel-Hady nor the officer detaining him was a party to the court orders in *Al-Kateb*. The erroneous, and overturned, reasoning in *Al-Kateb* could provide no authority for the officer or for the Commonwealth to detain Mr Abdel-Hady.

126 The Commonwealth is liable on two alternative bases. First, the Commonwealth is directly liable for the acts of the officer who was acting as its agent in detaining Mr Abdel-Hady. Secondly, the Commonwealth is vicariously liable by attribution of the liability of the detaining officer who was its employee.

The background and the question for this Court

127 Mr Abdel-Hady is an alien who, at the relevant times, had no visa entitling him to remain in Australia. Over a period of time which included the relevant period of the alleged commission of the tort of false imprisonment—28 July 2022 to 8 November 2023—the plaintiff, Mr Abdel-Hady, was detained by the Commonwealth. The parties agree that during that relevant period: (i) "there was no real prospect of [Mr Abdel-Hady's] removal to any country other than Austria becoming practicable in the reasonably foreseeable future"; and (ii) "there was no real prospect of [Mr Abdel-Hady's] removal from Australia to Austria becoming practicable in the reasonably foreseeable future, because [Mr Abdel-Hady's] aggressive thrombophilia rendered him medically unfit to travel by commercial aeroplane and no other mode of travel to Austria was reasonably practicable".

128 Although it was not reasonably practicable to remove Mr Abdel-Hady from Australia during the relevant period, the controversial decision of a majority of this Court in *Al-Kateb* held that ss 189(1) and 196(1) of the *Migration Act* imposed a duty on officers of the Commonwealth to detain indefinitely people in the position of Mr Abdel-Hady who were reasonably suspected of being unlawful non-citizens.

Mr Abdel-Hady was detained for a period which included 22 August 2017 to 8 November 2023.

129 On 8 November 2023, in *NZYQ*, this Court made orders which were based upon overturning the decision in *Al-Kateb*, holding that the *Constitution* did not permit the application of ss 189(1) and 196(1) of the *Migration Act* to the detention of a person where there was no real prospect of the removal of the person from Australia becoming practicable in the reasonably foreseeable future. The *Constitution*, and the application of s 3A of the *Migration Act*, required the statutory duty in ss 189(1) and 196(1) of the *Migration Act* to be disapplied from such circumstances.

130 The retroactive effect of the decision in *NZYQ* was that although the decision in *Al-Kateb* was the authority in Australia while Mr Abdel-Hady was detained, relevantly between 28 July 2022 and 8 November 2023, that decision did not represent the correct legal position, which was that the detention of Mr Abdel-Hady during the relevant period was unlawful.

131 It is unnecessary to restate the procedural history of Mr Abdel-Hady's claims that resulted in only a single question of law stated in the special case for the opinion of this Court. That question of law arises as a consequence of the detention of Mr Abdel-Hady being unlawful, and therefore involving false imprisonment, in the period between 28 July 2022 and 8 November 2023. The question in this special case is a compound question:

"Do [(i)] the Commonwealth and [(ii)] its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?"

132 Despite having agreed to the statement of the question for this Court in these terms, the Commonwealth submits that the existence of the immunity should be considered only in relation to its officer and that the first question of the immunity of the Commonwealth should not be answered. The Commonwealth attempts to remove the first agreed question from this Court by a concession that if the officer has no immunity then the Commonwealth is vicariously liable for its officer as an employee even if the Commonwealth would itself be immune from any direct liability. It is necessary at the outset to explain why this concession is neither factually nor legally a suitable basis upon which to avoid answering the first question before this Court.

The first question before this Court should be addressed

133 The label "vicarious liability" has often been misused to describe three different and distinct legal doctrines.¹⁴³ In *Bird v DP (a pseudonym)*,¹⁴⁴ five members of this Court explained that the only proper, or "true", use of the label "vicarious liability" is to describe the attribution of the liability of an employee to an employer. The vicarious liability of the employer is a derivative liability. It is this vicarious or derivative liability that the Commonwealth concedes arises in this case if the officer responsible for the detention of Mr Abdel-Hady is liable.

134 The vicarious or derivative liability of an employer is separate and distinct from the direct liability of an employer or principal, including that arising from a relationship of agency, where the acts of one person are attributed to another.¹⁴⁵ Direct liability based on the attribution of another's acts is a primary liability of the principal. It is not a derivative liability. Hence, a defence or immunity from liability held by the agent will not necessarily be held by the principal.¹⁴⁶ The principal may need to have a defence or immunity of its own.

135 In the pleadings before this Court, the Commonwealth admits vicarious liability but denies direct liability. The Commonwealth submits that it is therefore unnecessary to consider the question before this Court of whether the Commonwealth itself has an immunity from liability. The concession was not supported by any factual or legal reasoning. And the submission should not be accepted.

136 A similar issue arose in *Darling Island Stevedoring and Lighterage Co Ltd v Long*.¹⁴⁷ Mr Long, a wharf labourer, claimed damages from Darling Island Stevedoring and Lighterage Co Ltd ("Darling Island Stevedoring") for personal injuries suffered during the loading and unloading operations of a ship as a result of actions of an employee of Darling Island Stevedoring said to be in breach of statutory duty by infringement of reg 31 of the *Navigation (Loading and Unloading) Regulations 1941* (Cth), made under the *Navigation Act 1912* (Cth).

143 *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 185-187 [48]-[54].

144 (2024) 98 ALJR 1349 at 1361-1362 [44], 1367 [63]; 419 ALR 552 at 564, 571.

145 See, for instance, the discussion in *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1358-1359 [31]-[34]; 419 ALR 552 at 560-561. See also *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 187-189 [55]-[58].

146 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 61, discussing *Broom v Morgan* [1953] 1 QB 597 and *Stapley v Gypsum Mines Ltd* [1953] AC 663.

147 (1957) 97 CLR 36.

This Court unanimously held that Mr Long had no claim against Darling Island Stevedoring. Some members of this Court reached this conclusion by reasoning that the attribution of the employee's acts (direct liability based on agency) did not make Darling Island Stevedoring liable because the regulations imposed no duty on Darling Island Stevedoring. Other members of this Court reached this conclusion by reasoning that the attribution of the employee's liability (true vicarious liability) did not make the employer liable because the regulations did not contemplate vicarious liability.

137 The clearest approach in relation to direct liability was that of Kitto J who rejected the existence of any concept of "true"¹⁴⁸ vicarious liability and asserted that all such cases were really based upon "a liability for vicarious acts".¹⁴⁹ For Kitto J, the appeal by Darling Island Stevedoring was allowed because any wrong of breach of statutory duty, based upon the regulations, was committed only by the "person-in-charge".¹⁵⁰ The employer was not sued as the person-in-charge and therefore the attribution of the relevant acts to the employer could not result in liability.

138 By contrast, Fullagar J was the clearest in analysing the case as also involving a question of "true vicarious liability: that is to say, the master is liable not for a breach of a duty resting on him and broken by him but for a breach of duty resting on another and broken by another".¹⁵¹ That question, his Honour explained, was whether Darling Island Stevedoring could be liable (vicariously) for the liability arising from the breach of statutory duty of its employee. In order to answer that question it was necessary to engage in a careful analysis of the relationship between the common law of vicarious liability and the legislation from which liability was said to derive. Fullagar J agreed with Williams J that the relevant regulation, on its proper interpretation, had excluded the operation of vicarious liability at common law.¹⁵²

148 See *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1358 [31]; 419 ALR 552 at 560.

149 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 61; see also at 54 per Webb J, at 68-70 per Taylor J.

150 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 59.

151 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57; see also at 52 per Williams J.

152 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 58; see at 51-53 per Williams J; see also at 53-54 per Webb J. See, further, *Stoneman v Lyons* (1975) 133 CLR 550 at 577-579.

139 The concession of vicarious liability by the Commonwealth in this case was made without consideration of any of the difficult factual and legal questions arising from the interaction between common law vicarious liability and relevant legislation. For instance, an "officer" under the *Migration Act*, who has the duty under ss 189(1) and 196(1) to detain, can include a person who is not employed by the Commonwealth¹⁵³ and for whose actions the Commonwealth would not be subject to vicarious liability. And in Div 8 of the *Migration Act* ("Removal of unlawful non-citizens etc") the categories of an "officer" and an "officer of the Commonwealth" are now treated alike for the purpose of various defences.¹⁵⁴ Should the Commonwealth Parliament be taken to intend that the *Migration Act* operate alongside a common law regime of vicarious liability based upon the liability of an officer for the same act but depending upon whether the officer is a Commonwealth officer or not?

140 Beyond the operation of ss 189(1) and 196(1) there are questions concerning vicarious liability that loom in relation to the *Migration Act* generally. Should the Commonwealth Parliament be taken to intend that the *Migration Act* operate alongside a regime of common law vicarious liability based upon whether the person performing an act is the Minister or an officer who is a delegate of the Minister (and employed by the Commonwealth)? Are the good faith defences, such as those in s 198(13), concerned with liability based upon agency, rather than vicarious liability, since a condition of the defence, and the consequent absence of liability, is expressed as being "in relation to any act or thing done, or omitted to be done" rather than in relation to any liability incurred by another?

141 None of these questions clearly arise in relation to direct liability of the Commonwealth. The *Migration Act* must have been drafted and amended in light of the long-established path to Commonwealth liability being liability for the attributable acts of its agents, which necessarily requires consideration of whether, despite any immunity of its agents, the Commonwealth itself has any immunity from liability based upon an act or omission that is attributed to it. In *Zachariassen v The Commonwealth*,¹⁵⁵ a joint judgment of Barton, Isaacs and Rich JJ said of officers of the Department of Trade and Customs acting in the administration of the Department that it was:

"difficult to see how the Commonwealth can so far dissociate itself from the administration of the Department as to say any of its functions are not

153 *Migration Act*, s 5(1): definition of "officer", para (d) ("a member of ... the police force of a State or an internal Territory"), para (f) ("a person who is authorised in writing by the Minister to be an officer for the purposes of [the *Migration Act*]").

154 *Migration Act*, s 198(13).

155 (1917) 24 CLR 166 at 179.

functions of the Commonwealth, but of some person in his own individual capacity, entirely independent of the Commonwealth".

In relation to the execution of the *Customs Act 1901* (Cth), the joint judgment added "[s]o reading it, there is a duty on the Commonwealth (by the hand of the Collector) to grant the clearance if satisfied that the law has been complied with".¹⁵⁶

142 Again, in *Shaw Savill and Albion Co Ltd v The Commonwealth*,¹⁵⁷ Starke J spoke of the liability of the Commonwealth, consistently with ss 56 and 64 of the *Judiciary Act 1903* (Cth) and the *Constitution*, "for the acts, neglects or defaults of its officers in the course of their service as in a suit between subject and subject unless the officer is executing some independent duty cast upon him by the law". The reference to an independent duty is to the doctrine derived from *Enever v The King*.¹⁵⁸ That "firmly established"¹⁵⁹ doctrine, consistently with the principles of the "general law of agency",¹⁶⁰ excludes the attribution to the Commonwealth of an act by an officer where the act is not undertaken as an agent for the Commonwealth but is undertaken on the officer's own behalf.¹⁶¹ The "Crown is not acting through [the officer]".¹⁶²

143 It is unnecessary to consider whether the doctrine that precludes attribution to the Commonwealth of the independent acts of an officer could, or should, apply to "true" vicarious liability which does not rest upon principles of agency. The acts of detention, purportedly authorised under ss 189(1) and 196(1) of the *Migration Act*, were not performed in this case by the detaining officer on their own behalf and by their own discretion.¹⁶³ The officers to which the *Migration Act*

156 *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181.

157 (1940) 66 CLR 344 at 352-353 (emphasis added).

158 (1906) 3 CLR 969. See also *Baume v The Commonwealth* (1906) 4 CLR 97; *Pitcher v Federal Capital Commission* (1928) 41 CLR 385; *Musgrave v The Commonwealth* (1937) 57 CLR 514.

159 *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 637.

160 *Enever v The King* (1906) 3 CLR 969 at 977.

161 See *Northern Land Council v Quall* (2020) 271 CLR 394 at 430-432 [81]-[84].

162 *Field v Nott* (1939) 62 CLR 660 at 675.

163 See *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 724.

refers are generally not persons who occupy a prescribed statutory position where they act on their own behalf. Rather, the definition of an officer in s 5(1) of the *Migration Act* includes "an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph".

144 The natural manner of imposing liability upon the Commonwealth, subject to defences, is therefore through the principles of agency. And the only true defence to direct liability which has been suggested by the Commonwealth to be applicable in this case is the proposed new defence. The issues raised in this special case should not be complicated by assuming contentious facts and legal propositions in order to treat the Commonwealth as vicariously liable in the event that the detaining officer is not immune from liability. The better approach is to address directly the special case question before the Court which asks whether the proposed new defence (in the nature of an immunity) is available to both the officers and the Commonwealth.

The proposed new defence

145 The proposed new defence, which is in the nature of an immunity, must be considered as both an immunity from liability for the Executive and an immunity from liability for the Commonwealth body politic. The Commonwealth submitted that the new defence required, at most, three aspects (with later cases to consider whether any of these aspects might be unnecessary): (i) actions were taken by an officer of the Executive whose duty to obey the law as declared by this Court was reinforced by the *Public Service Act 1999* (Cth), particularly s 13(4); (ii) the officer was acting pursuant to an apparent statutory duty to detain (such as ss 189(1) and 196(1) of the *Migration Act*); and (iii) the officer was acting during a period of time when current and binding High Court authority (such as *Al-Kateb*) held that the duty to detain validly applied to require such detention.

146 As to the first aspect of the formulation of the proposed new defence, s 13(4) of the *Public Service Act*, when read with the definitions in s 7, provides that an Australian Public Service employee "when acting in connection with [Australian Public Service] employment, must comply with all applicable Australian laws". Section 13(4) provides for the meaning of "Australian law" in terms which include "any Act (including this Act)".¹⁶⁴ Section 15 provides for disciplinary sanctions for breaches of the Code of Conduct, which includes s 13(4).

147 This first aspect of the formulation of the proposed new defence does not add anything to the second and third aspects of the defence. The Australian laws to which s 13(4) of the *Public Service Act* refers are only those laws which are valid and applicable. Of course, the exclusion from s 13(4) of invalid or inapplicable laws does not mean that officers are free to disregard binding orders

¹⁶⁴ *Public Service Act*, s 13(4)(a).

of a court.¹⁶⁵ Court orders, even if supported by incorrect reasoning, have binding effect until set aside. But neither orders nor reasoning of a court, in a case to which an officer is not a party (or a privy of a party), is directly binding on the officer. The reasoning in such cases creates norms that the officer should usually follow but the officer is not directly bound to do so. Section 13(4) therefore does not create a duty of obedience to invalid or inapplicable laws which might appear from reasoning in court decisions (other than those in which the officer is a party), perhaps even very clearly, to be valid and applicable.

148 An officer might receive legal advice that the circumstances of a case were sufficiently different from a similar case to require a different application. Or the officer might receive legal advice that it is unclear from the reasoning in the similar case whether that case applies to the facts before the officer. Or the officer might receive legal advice that the similar case is vulnerable to challenge. In each instance, the officer would no doubt be advised of the risk involved if the officer did not apply the legal norm set out in the similar case and it was later held that the legal norm did apply to the circumstances. The legal norms created by the reasoning in judicial decisions are not things writ in water; they must be weighed carefully and usually followed. But they do not bind directly. Hence, s 13(4) does not require an officer to apply a statutory law if, on the correct application, that law is inapplicable to the circumstances before the officer.

149 The content of the proposed new defence therefore reduces to the second and third aspects. Those aspects are rife with uncertainty as to their limits and their rationale. Why would the immunity be limited to false imprisonment arising from an apparent duty to detain? Would it extend to a claim of trespass where the officer relies upon an apparent duty to enter the land of another? Would it extend to a claim of assault or battery where the officer relies upon an apparent duty to act in a way that involves an assault or battery? Would the immunity extend to the exercise of statutory powers in addition to duties? When is a duty to detain sufficiently "apparent" from legislation? Would a duty that is sufficiently apparent cease to be so if the officer had received legal advice that the position was uncertain? Would the binding authority that is one of the criteria for the immunity be limited to binding authority of this Court, as the Commonwealth sought to confine it for the purposes of this case? Would the immunity apply if the only reason that there was no binding authority of any court was that there was no doubt at the time concerning the interpretation of the apparent statutory duty?

150 The vast uncertainty in the formulation of this proposed new defence is not a promising start. Perhaps recognising this, the Commonwealth sought to avoid the questions surrounding the proposed immunity effectively by submitting that the immunity should be recognised in this case in terms closely tailored to the particular facts, leaving the identification of the boundaries and operation of the

¹⁶⁵ *New South Wales v Kable* (2013) 252 CLR 118 at 135-136 [38]-[40].

proposed immunity, and thus its principled foundation, to future cases. The Commonwealth relied upon reasoning of some members of this Court that the "performance of an adjudicative function in an adversary setting 'proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy'".¹⁶⁶ Whatever that reasoning might mean,¹⁶⁷ it cannot be taken literally. No court, including this Court, enjoys a licence to abandon the principled development of the law at the altar of ad hoc teleological reasoning under a mask of judicial minimalism. The basis in principle for the proposed immunity must be addressed.

Problems with the proposed new immunity

The retroactive nature of judicial decision-making

151 In *R v Governor of Brockhill Prison, Ex parte Evans [No 2]*,¹⁶⁸ a prison governor calculated the conditional release date for a prisoner, Ms Evans, based upon a 1982 decision of the Divisional Court¹⁶⁹ that had been followed in later cases but had been strongly criticised,¹⁷⁰ and was in tension with a decision delivered shortly after the governor calculated the conditional release date.¹⁷¹ Ms Evans successfully challenged that calculation and the Divisional Court held that the 1982 decision of the Divisional Court and the authorities applying that decision should not be followed. The Divisional Court ordered that Ms Evans had been entitled to release 59 days earlier, with the effect that she had been kept in prison for 59 days longer than she should have been. Following her release, Ms Evans claimed damages against the governor for false imprisonment. The governor alleged that he had a defence of justification because "what he did was in

166 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [58], quoting *Clubb v Edwards* (2019) 267 CLR 171 at 217 [137].

167 Compare *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 259 [98]-[99].

168 [2001] 2 AC 19 at 25-27, 39.

169 *R v Governor of Blundeston Prison, Ex parte Gaffney* [1982] 1 WLR 696; [1982] 2 All ER 492.

170 See Thomas, "*R v Governor of HM Prison Styal, Ex parte Mooney*" [1995] *Criminal Law Review* 753 at 753, referred to in *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 41.

171 *R v Secretary of State for the Home Department, Ex parte Naughton* [1997] 1 WLR 118; [1997] 1 All ER 426.

compliance with what the law was thought to be". The governor submitted that he "had no choice" other than to comply with the law as expounded by the courts.¹⁷²

152 The governor's calculation of the conditional release date of Ms Evans was not mandated by any court order or warrant for the imprisonment of Ms Evans. Although the warrant had sufficient legal effect to justify imprisonment, as it was not "on its face issued by persons who have no jurisdiction to issue a warrant",¹⁷³ there was no court order or warrant that identified her conditional release date.¹⁷⁴ The governor could not argue that his action was justified based on compliance with a court order or a warrant. Nor could he argue that his decision was one of application of a legal rule for which judicial latitude should be afforded on review.¹⁷⁵ Instead, his argument was that the law should recognise a new defence that either: (i) his action was justified based on his compliance with an applicable finding of a court in a different case about the construction of a statute; or (ii) English law should recognise a principle of non-retrospectivity of judicial decision-making where an earlier decision is overruled or not followed or where a court departs from a widely held assumption as to the state of the law.¹⁷⁶

153 The two submissions were not entirely independent. The ultimate foundation of the first submission was that the retroactive effect of overturning a judicial decision should be limited so that the overturned judicial decision is capable of providing justification for the actions of third parties, in the same way that compliance with orders and warrants issued by a court provides justification for actions by persons to whom the orders and warrants are directed. On the issue of non-retrospectivity directly raised by the second submission, Mr Rabinowitz, whose great learning and assistance as amicus curiae had been sought in the House of Lords,¹⁷⁷ creatively submitted that a "more flexible approach" should be applied to judicial overruling since "the fundamental tenet of the declaratory theory, that

172 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 26; see also at 32.

173 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 44, quoting *Henderson v Preston* (1888) 21 QBD 362 at 366.

174 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 34, 44-45.

175 See *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345; *Norbis v Norbis* (1986) 161 CLR 513 at 539-540.

176 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 42-43.

177 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 36.

judges do not make law, is generally regarded as a fairy tale".¹⁷⁸ His submissions reflected, in more polite and nuanced terms, the bellicose dissent of Holmes J in *Black & White Taxicab Co v Brown & Yellow Taxicab Co*.¹⁷⁹

154 Both submissions by the governor were unanimously rejected. The House of Lords concluded that the governor was liable for false imprisonment of Ms Evans. As Lord Slynn recognised, from the point of view of the governor it might be thought that liability for false imprisonment "seems unreasonable" since "what more could he have done?" Nevertheless, the result was "clear".¹⁸⁰ The governor had no defence based upon the judicial interpretation of the relevant legislation that prevailed at the time that the governor calculated the conditional release date of Ms Evans. As Lord Hope held, it could not be "sensibly argued" that the legislation "meant one thing at the time when the governor made his calculation and another when its meaning was [later] determined authoritatively by the Divisional Court".¹⁸¹

155 The result in *Evans* also represents Australian law.¹⁸² It is solidly based upon foundational principles. When, on a matter involving interpretation of meaning or identification of a legal rule, a decision is overruled, or a decision of a co-ordinate court is overturned, the implicit assumption is generally that the legal principle that takes the place of that which previously obtained was "at all relevant times legally correct and an authentic legal rule".¹⁸³ This assumption does not deny that judges can create, and retroactively change, law (in the sense of legal norms posited by judges) by decisions concerning the common law. Nor does it deny that judges can create and retroactively change posited legal norms by decisions concerning the interpretation or application of legislation. Nor does the assumption deny that these posited legal norms can influence the direction of the common law, or the future interpretation or application of legislation.¹⁸⁴ Such denials would

178 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 24.

179 (1928) 276 US 518 at 533-534, rejected in Dixon, "Sources of Legal Authority", reproduced in *Jesting Pilate and Other Papers and Addresses* (1965) 198 at 198-199.

180 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 26.

181 *R v Governor of Brockhill Prison, Ex parte Evans [No 2]* [2001] 2 AC 19 at 37.

182 See *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714.

183 Finnis, "The Fairy Tale's Moral" (1999) 115 *Law Quarterly Review* 170 at 174-175. See *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 368 [96].

184 *Vunilagi v The Queen* (2023) 279 CLR 259 at 310-312 [159]-[165].

indeed be a fairy tale.¹⁸⁵ But the posited legal norms created or retroactively changed by judges concerning the common law are not, themselves, the "common law" that binds members of the public generally in its application to a particular circumstance. The common law is "common" because it consists of the directly binding rules and principles deducible from principled reasoning based upon, but not limited to, judicially posited legal norms. The posited legal norms created or retroactively changed by judges in the interpretation or application of legislation are not directly binding on members of the public generally. The lack of a directly binding nature of the legal norms posited by judges thus contrasts with judicial orders of courts which bind those who are subject to them, usually only the parties.

156 The assumption is that when judges posit legal norms which change the way in which the common law or the meaning of a legislative provision is understood they are generally doing so by endeavouring to state what the correct legal position has always been.¹⁸⁶ That is why, unlike some instances of *application* of legal principles and rules where there is no single correct answer,¹⁸⁷ even when the meaning of a legislative provision is ambiguous, and even when a contrary, and reasonable, interpretation might have been adopted by another court, any interpretation must be reviewed on appeal on the basis that there is only one correct answer to the meaning of that legislative provision.¹⁸⁸

157 These foundational principles form part of the basis for the difference between judicial and legislative power. When judges pronounce the common law or interpret legislation they are not legislating. Their primary purpose is "the determination of the dispute in hand".¹⁸⁹ In fulfilling that primary purpose, it is the duty of judges "to ascertain as best they may"¹⁹⁰ the common law or the meaning of legislation in order to pronounce upon how the common law or the meaning of

185 Reid, "The Judge as Law Maker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 22.

186 Juratowitch, *Retroactivity and the Common Law* (2008) at 41-42; Beever, "The Declaratory Theory of Law" (2013) 33(3) *Oxford Journal of Legal Studies* 421.

187 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 561 [44], 582-583 [128].

188 *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78-79, citing *McConnel v Murphy* (1873) LR 5 PC 203 at 219; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 567 [60], 591 [150], 593 [154].

189 *Fencott v Muller* (1983) 152 CLR 570 at 609.

190 Dixon, "Sources of Legal Authority", reproduced in *Jesting Pilate and Other Papers and Addresses* (1965) 198 at 199.

legislation should always have been understood.¹⁹¹ In unusual circumstances, an amendment by Parliament to laws contained in a statute might change the meaning of other laws within that statute as well as the laws upon which the amended provision operates. Or a significant change in economic or social conditions might change a common law rule,¹⁹² or the application of legislative meaning,¹⁹³ although not the basal principles that underlie the common law or the essential meaning of the legislation. In such cases, the meaning of the legislative rule changes from the time of the amendment and the common law rule can sometimes change only from the time of an economic or social change.¹⁹⁴ Judicial reasoning, which posits the legal norms that aim to reflect that common law rule or statutory meaning at the time that the events occurred, is therefore not confined to what the posited legal norm should be *prospectively* from the date of the decision.

158 For these reasons this Court was right in *Ha v New South Wales*¹⁹⁵ to reject unanimously a judicial power to overrule prospectively. As four members of the Court said (with the agreement of the other three), the "adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power". In speaking of the impermissible judicial "creation of [new] rights", their Honours were attempting to convey the same point made almost 150 years earlier by Pollock CB: "the Common Law cannot create new rights ... because, in the opinion of those who administer the Common Law, such rights ought to exist".¹⁹⁶ Either rights and obligations existed at the time of the events in issue or they did not. So too, in *Evans* Lord Hobhouse of Woodborough said that apart from decisions on practice and procedure:¹⁹⁷

"It is a denial of the constitutional role of the courts for courts to say that the party challenging the status quo is right, that the previous decision is over-ruled, but that the decision will not affect the parties and only apply subsequently. They would be declining to exercise their constitutional role

191 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 367-369 [94]-[98].

192 See *Edwards v Porter* [1925] AC 1.

193 *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2024] AC 89 at 118-120 [84]-[88], 122 [95].

194 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 460, 463-464, 469-470.

195 (1997) 189 CLR 465 at 504; see also at 515.

196 *Jefferys v Boosey* (1854) 4 HLC 815 at 936 [10 ER 681 at 729].

197 [2001] 2 AC 19 at 48. See also *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 368-369 [97].

and adopting a legislative role deciding what the law shall be for others in the future. This anomaly is also illustrated by the law of precedent and the concept of ratio decidendi which it uses. Such a decision would by definition not be part of the ratio decidendi of the case and therefore would not constitute an authoritative decision."

159 In rare cases, the effect of these basic principles can be to create an almost impossible dilemma for law-abiding persons, such as the detaining officer in this case. They are required to comply with legal rules created by valid legislation. And they might become aware of the legal norms created by a judicial interpretation of those rules, or a ruling on the validity of that legislation, in a case where they were not parties and are not directly bound by the orders. The norms created by such decisions will shape the behaviour of law-abiding persons as to how to respond to the facts before them by applying an interpretation of the legislation or by reaching a conclusion about the validity of legislation on the facts before them. But, in unusual cases (of which this is one), those norms might be found to have been incorrectly stated, leading to unlawful behaviour by those who have sought to comply with the law as stated in other cases.

The decision of this Court in Stradford

160 The Commonwealth relied heavily upon the decision of this Court in *Stradford*¹⁹⁸ as providing support for the proposed new defence. Although some language in the decision might be thought to provide support for the Commonwealth's proposed new defence, such language, properly understood, cannot support the proposed new defence.

161 In *Stradford*, Mr Stradford claimed that he had been falsely imprisoned as a result of what he claimed was an invalid order made by, and an invalid warrant issued by, a judge of the (then) Federal Circuit Court of Australia, Judge Vasta. Mr Stradford claimed damages against various parties to his false imprisonment. In the false imprisonment proceedings, the primary judge in the Federal Court of Australia found that the order made by, and the warrant issued by, Judge Vasta were the product of jurisdictional errors and were invalid. Since the judicial order and warrant had no authority, the order could not justify the false imprisonment caused by, or participated in by, the Federal Circuit Court judge, the guards, the police officers, and the correctional officers.

162 On the appeals, which were removed from the Full Court of the Federal Court of Australia, this Court unanimously held that, in the words of four Justices, "the common law affords some protection from civil liability to those who have a legal duty to enforce or execute orders or warrants made or issued in judicial proceedings of the courts just described" and that this protection applies to orders

198 (2025) 99 ALJR 396; 421 ALR 376.

or warrants made or issued by a court "even if those orders or warrants" were the consequence of jurisdictional error.¹⁹⁹

163 For the reasons I gave in *Stradford*, the order and warrant of Judge Vasta were valid despite being the consequence of legal error and therefore provided authority for those who had a legal duty to enforce or execute them to do so. Even the guards had subjected themselves, by their contractual duty of "guarding as directed"²⁰⁰ in court, to the concurrent duty to comply with judicial directions that have sufficient validity.²⁰¹ There was properly no doubt in *Stradford* that orders of, and warrants issued by, a so-called "superior court", even if the subject of legal error, would have sufficient validity to provide authority for those whose legal duty was to enforce or execute them to do so. At least in respect of this protection, therefore, no member of this Court applied the antique common law distinction that would draw a divide between different courts, including a divide, unrecognised in Ch III of the *Constitution*, between "inferior" [sic] federal courts and so-called "superior" federal courts. Steward J and I held that such a divide should not be recognised either in the common law or constitutional law of Australia.

164 The decision in *Stradford* was therefore that each of the persons who were alleged to have committed the tort of false imprisonment had done so with legal authority and therefore had committed no wrong. The same reasoning has been used to explain the result in a decision relied upon by the Commonwealth in this case, in which constables acted lawfully under common law powers and would have done so even if their exercise of those powers had been for offences against invalid byelaws.²⁰² This defence of authority is anterior to, and distinct from, an immunity which can arise from a person's status. An immunity concedes that a wrong has been committed but immunises a person from another's power to impose liability for that wrong for reasons such as some status of the person.²⁰³ There are respects in which the common law affords to a judicial officer an immunity from

199 *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396 at 408 [13]; 421 ALR 376 at 381.

200 *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396 at 471 [318]; 421 ALR 376 at 466.

201 *Federal Circuit Court of Australia Act 1999* (Cth), s 17.

202 See *Percy v Hall* [1997] QB 924 at 947-948, explained in *R (Majera) v Secretary of State for the Home Department* [2022] AC 461 at 477 [31].

203 See Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 55-58.

liability "for the protection of judicial independence in the public interest".²⁰⁴ That limited immunity is co-extensive with its rationale of protecting judicial independence.²⁰⁵ Whether or not Judge Vasta had any judicial immunity in relation to the consequences of the order he pronounced or the warrant that he issued, none of the guards, police officers, or correctional officers were immunised from liability because of the status of those persons. It is well established that none of those statuses afford any common law immunity from liability.²⁰⁶

165 The foundational basis for the defences in *Stradford* thus lay in the effect of the order made by, and warrant issued by, Judge Vasta, not upon some notion of immunity based upon the status of Judge Vasta as a judge. The order and warrant were not wholly invalid. No aspect of the defences rested upon any honest or reasonable belief by the guards, police officers, and correctional officers as to the legality of their conduct based upon reasoning expressed by Judge Vasta. It was only the order and warrant that were binding upon the persons to whom they were directed: the guards, police officers, and correctional officers. As Lord Hobhouse said in *Evans*,²⁰⁷ "[j]udicial decisions are only conclusive as between the parties to them and their privies".

166 Although *Stradford* was concerned with the authority to act of the various persons who relied upon an order and a warrant that were the result of legal errors, some of the reasons of this Court in *Stradford* describe the lack of liability of each of Judge Vasta, the guards, the police officers, and the correctional officers as arising from an "immunity" or a "judicial immunity". In the present case, the Commonwealth fastened upon this use of language by a submission that since the absence of liability for Judge Vasta arose from a judicial immunity, the absence of liability for the guards and other officers must arise from a separate common law defence founded upon compliance with the state of existing law as declared by a court. The Commonwealth submitted that "[t]he issue of judicial immunity in *Stradford* arose only in relation to the liability of Judge Vasta and not in relation to the availability of the common law defence for the enforcing officials".

167 If the basis upon which Judge Vasta was able to avoid liability for false imprisonment had been judicial immunity then, since the status of the guards, police officers, and correctional officers could not afford them any immunity, this

204 *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38].

205 *Yeldham v Rajski* (1989) 18 NSWLR 48 at 69.

206 *Enever v The King* (1906) 3 CLR 969 at 976; *Little v The Commonwealth* (1947) 75 CLR 94 at 114. See also *A v Hayden* (1984) 156 CLR 532; *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 742.

207 [2001] 2 AC 19 at 45.

Court would have implicitly recognised, contrary to longstanding authority, a remarkable new common law defence for persons who perform a duty in compliance with an apparent, although invalid, law. The submission by the Commonwealth would be unanswerable. But, despite the loose use of the language of "immunity", that is a mischaracterisation of the decision in *Stradford*.

A V Dicey and the lack of analogy with United States and Canadian law

168 In the absence of any coherent principled basis for the proposed new defence, and in the teeth of Australian and English authority, the Commonwealth relied upon United States and Canadian authority which recognises a qualified immunity for executive officers and the body politic. Those decisions cannot be transplanted into Australian law. Indeed, an analysis of those decisions reveals the most fundamental problem for the immunity proposed by the Commonwealth: its inconsistency with the Diceyan principle of legal equality.

169 The leading decision in the United States is that of the Supreme Court of the United States in *Pierson v Ray*.²⁰⁸ In that case, a claim had been brought against police officers and a local judge for false arrest and false imprisonment, and for statutory civil rights violations. The petitioners were part of a group of black and white clergymen who were part of a tour to promote racial equality. They entered a waiting area at an interstate bus terminal which was designated "White Waiting Room Only—By Order of the Police Department". The clergymen petitioners were arrested and detained by the police officers for a misdemeanour under the *Mississippi Code* that, some years later, was found to be unconstitutional in its application to similar facts. The clergymen were sentenced to four months in jail by the local judge.

170 Unlike the guards, police officers, and correctional officers in *Stradford*, the arresting and detaining police officers in *Pierson* had no defence (justification) of authority based upon compliance with binding judicial orders. The only basis upon which the police officers could avoid liability was the existence of a particular privilege or immunity special to the police. Warren CJ, delivering the reasons of the majority of the Supreme Court, considered that an immunity existed at common law which was part of the "background" to the relevant civil rights legislation, describing the defence as one of "good faith and probable cause" where "the officers reasonably believed in good faith that the arrest was constitutional".²⁰⁹ The Chief Justice explained:²¹⁰

208 (1967) 386 US 547.

209 *Pierson v Ray* (1967) 386 US 547 at 556-557.

210 *Pierson v Ray* (1967) 386 US 547 at 555 (citation omitted).

"A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."

171 The majority of the Supreme Court did not attempt to justify the defence recognised in *Pierson* as a matter of principle in instances where the arrest is made for a felony or misdemeanour under a law that is unconstitutional. The defence was simply asserted, with little reference to authority, to exist as a matter of common law. That assertion has been powerfully criticised as being historically inaccurate,²¹¹ including on the basis that it is inconsistent with a foundational decision of Marshall CJ.²¹² The majority referred to the recognition of the defence in, inter alia, the *Restatement (Second) of Torts*,²¹³ albeit that the recognition in that text came with a caveat that no opinion was expressed as to the circumstance where the arrest was made for a suspected offence under a provision of legislation later found to be unconstitutional.

172 Even apart from the controversy surrounding the decision, there are serious difficulties with the reliance by the Commonwealth upon the controversial "immunity" recognised in *Pierson*. As Tentative Draft No 6 of the *Restatement (Third) of Torts*²¹⁴ makes clear, although "[i]t is not uncommon for courts improperly to conflate these analyses", a defence of law enforcement officials to a claim of wrongful arrest and imprisonment is not an immunity from the law at all. It is a privilege. The defence does not concede the wrongfulness of the action and assert an immunity from liability based upon status. Rather, the defence claims that the action was not wrongful because the official enjoyed a privilege to perform that action.

211 Pfander and Hunt, "Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic" (2010) 85 *New York University Law Review* 1862 at 1923; Doernberg, "Taking Supremacy Seriously: The Contrariety of Official Immunities" (2011) 80 *Fordham Law Review* 443 at 466; Baude, "Is Qualified Immunity Unlawful?" (2018) 106 *California Law Review* 45 at 55.

212 *Little v Barreme* (1804) 6 US 170.

213 American Law Institute, *Restatement (Second) of Torts* (1965) at §121.

214 American Law Institute, *Restatement (Third) of Torts, Tentative Draft No 6* (2021) at §39.

173 The common law "law enforcement privilege" upon which the decision in *Pierson* may have been based (which also includes a more limited form for private citizens²¹⁵) is not unique to the United States. Such a privilege—to arrest and detain a person reasonably suspected of committing a crime for the purpose of bringing the person before a magistrate—is long-established in English common law²¹⁶ and recognised by this Court.²¹⁷ It has nothing to do with the facts of this case, which concern the unlawful detention of a person by an officer of the Executive acting without authority. The Commonwealth properly concedes that the action of the officer was unlawful (ie that there was no privilege).

174 It may be, however, that the defence recognised by the Supreme Court of the United States in *Pierson* is capable of an alternative understanding not as a privilege but, consistently with the language used by the Supreme Court in other cases, as a "governmental immunity".²¹⁸ For instance, in *Filarsky v Delia*,²¹⁹ Roberts CJ, delivering the opinion of the Court, said that "[a]t common law, those who carried out the work of government enjoyed various protections from liability when doing so, in order to allow them to serve the government without undue fear of personal exposure".

175 The same broad-based governmental immunity is recognised in Canadian law in the context of the *Canadian Charter of Rights and Freedoms*. In the leading decision, *Mackin v New Brunswick (Minister of Finance)*,²²⁰ Gonthier J (giving the judgment of L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ) considered a claim against the Province of New Brunswick for the enactment of unconstitutional legislation that abolished supernumerary judicial status. Gonthier J said of liability for damages under s 24(1) of the *Canadian Charter* that it is "only in the event of conduct that is clearly wrong, in bad faith or an abuse of

215 American Law Institute, *Restatement (Third) of Torts, Tentative Draft No 6* (2021) at §39-§40.

216 *Dumbell v Roberts* [1944] 1 All ER 326; *Hussien v Chong Fook Kam* [1970] AC 942 at 948. See also Bullen and Leake, *Precedents of Pleadings in Personal Actions in The Superior Courts of Common Law*, 3rd ed (1868) at 795-796.

217 *Williams v The Queen* (1986) 161 CLR 278 at 283-284, 292-293, 305; *New South Wales v Robinson* (2019) 266 CLR 619 at 638-639 [30]-[31], 664-665 [89]-[91].

218 *Richardson v McKnight* (1997) 521 US 399 at 412. See also *Harlow v Fitzgerald* (1982) 457 US 800.

219 (2012) 566 US 377 at 380. See also *Ashcroft v al-Kidd* (2011) 563 US 731 at 743 ("[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions").

220 [2002] 1 SCR 405 at 443 [79].

power that damages may be awarded". The rationale for this immunity was said to be that "[o]therwise, the effectiveness and efficiency of government action would be excessively constrained".

176 In *Mackin*, the remarks by Gonthier J were not made in the context of considering the liability of public officials. As Wagner CJ and Karakatsanis J (delivering the judgment also of Martin, O'Bonsawin and Moreau JJ) later explained in *Canada (Attorney General) v Power*,²²¹ "*Mackin* concerned only the enactment of legislation ... The *Mackin* principle of limited immunity was plainly set out in the context of the 'enactment' of law, and as applying to 'legislative bodies'". Nevertheless, the *Mackin* principle has been held also to apply to executive action "because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down".²²² And it has been said that the principle applies to claims in tort as well as claims based on s 24(1) of the *Charter*.²²³

177 The justification in United States and Canadian law for a unique immunity for public officials based upon the notion of efficient and effective government silently brushes aside the powerful Diceyan principle of equality under the law. Dicey's second principle that every person is "subject to the ordinary law of the realm" was one that expressly excluded "the idea of any exemption of officials or others from the duty of obedience to the law".²²⁴ The cogency of that second principle has been consistently recognised from the earliest decisions of this Court: "[i]f an act is unlawful ... a person who does it can claim no protection by saying that he acted under the authority of the Crown".²²⁵ The force of the second principle led to the claim by Deane and Toohey JJ, later rejected by a majority of this

221 (2024) 494 DLR (4th) 191 at 232 [63].

222 *Vancouver (City) v Ward* [2010] 2 SCR 28 at 47 [41].

223 *Guimond v Quebec (Attorney General)* [1996] 3 SCR 347 at 357, citing *Welbridge Holdings Ltd v Greater Winnipeg* [1971] SCR 957. See also [1996] 3 SCR 347 at 358, quoting Cooper-Stephenson, *Charter Damages Claims* (1990) at 330-332.

224 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 177-178, 215.

225 *Clough v Leahy* (1904) 2 CLR 139 at 155-156. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427-428.

Court²²⁶ but perhaps not entirely,²²⁷ that the *Constitution* itself contains an assumption of legal equality.²²⁸

178 The undermining of the Diceyan principle of legal equality can also be seen in the suggestion in the *Restatement (Second) of Torts*²²⁹ that the history of governmental immunity in the United States is derived from a notion of sovereign immunity; the immunity from liability of the King in his courts. That notion of immunity is inconsistent with s 75(iii) of the *Constitution* and is no part of Australian law.²³⁰ Indeed, even the so-called "presumptions" that the Commonwealth Parliament intends to exempt the Commonwealth body politic or its officers from civil, and sometimes criminal, liability have been reduced to vanishing insignificance, perhaps awaiting a final burial.²³¹

179 There is no principled basis to use United States or Canadian jurisprudence as a means to develop a new immunity in Australian law.

Conclusion

180 The absence of any immunity from liability of either the Commonwealth or its officers makes it unnecessary to consider the submissions of the intervener, BOE21, concerning whether any such immunity would be inconsistent with "constitutional imperatives, as proscribed by this Court in *Lange v Australian Broadcasting Corporation*^[232]".

226 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 44-45, 63-68, 142, 153-155.

227 *Palmer v Western Australia* (2021) 274 CLR 286 at 300-301 [24].

228 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485-488.

229 American Law Institute, *Restatement (Second) of Torts* (1979) at §895A (comment a), §895D (comment a).

230 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 551. See also *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 157 [59]; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 57-58 [59], 83 [142]; *Blunden v The Commonwealth* (2003) 218 CLR 330 at 336 [9].

231 *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 281 CLR 525 at 534-535 [11], 538 [21], 588-592 [176]-[185], 609 [244].

232 (1997) 189 CLR 520 at 566.

181 The compound question in the special case should be answered as follows:

Question: *Do [(i)] the Commonwealth and [(ii)] its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?*

(i) *No.*

(ii) *No.*

182 STEWARD J. I respectfully agree with the answer given by Gordon J to the
question of law stated for the opinion of this Court. I also gratefully adopt
Gordon J's description of facts and issues.

183 Before this Court is a simple dilemma: should an officer of the
Commonwealth be liable for acting in accordance with that officer's duty, as
accurately and lawfully perceived at that time, where – by reason of a subsequent
decision of this Court²³³ – the officer is later found to have thereby acted
unlawfully? In my view, the officer is indeed liable in such circumstances.

184 The same dilemma confronted the House of Lords in *R v Governor of
Brockhill Prison; Ex parte Evans [No 2]*.²³⁴ In that case the governor of a British
prison unlawfully detained a prisoner for 59 days. He detained that prisoner in
reliance upon a series of previous judicial decisions relating to the calculation of
the prisoner's correct release date. But those decisions were subsequently found by
the Divisional Court to be relevantly erroneous. The prisoner claimed damages for
false imprisonment.

185 In his speech, Lord Slynn of Hadley succinctly posed the question for
determination thus: "[i]s it a defence to a claim for false imprisonment that [the
governor] complied with the law as the court then said it was?"²³⁵ Lord Slynn
described the dilemma for the law in these terms:²³⁶

"If the claim is looked at from the governor's point of view liability
seems unreasonable; what more could he have done? If looked at from the
applicant's point of view she was, it is accepted, kept in prison unlawfully
for 59 days and she should be compensated. Which is to prevail?"

186 Lord Slynn answered the dilemma in the clearest possible terms. Despite
sympathy for the governor's position, it was not enough that it was "merely
thought" that the prisoner was lawfully detained when in fact she was not.²³⁷ A
false but honestly held belief about the lawfulness of the detention was no defence.
The prisoner was either lawfully detained or not in fact; if not, the prisoner was
entitled to her remedy.

233 See generally *NZYQ v Minister for Immigration, Citizenship and Multicultural
Affairs* (2023) 280 CLR 137.

234 [2001] 2 AC 19.

235 *Evans [No 2]* [2001] 2 AC 19 at 26.

236 *Evans [No 2]* [2001] 2 AC 19 at 26.

237 *Evans [No 2]* [2001] 2 AC 19 at 26.

187 That conclusion was compelled by an ancient and foundational principle of law, articulated by Lord Atkin in the past,²³⁸ and cited by both Lord Steyn and Lord Hobhouse of Woodborough in *Evans [No 2]*,²³⁹ and which is the law in this country. That principle is as follows:²⁴⁰

"no member of the executive can interfere with the liberty or property of a [person] except on the condition that he can support the legality of his action before a court of justice".

188 I respectfully agree with the foregoing reasoning. In addition, subject to what is said about the operation of Ch III of the *Constitution*, I generally, and very respectfully, agree with the reasons of Gordon J and of Edelman J.

238 See generally *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662.

239 [2001] 2 AC 19 at 28, 42.

240 *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662 at 670.

JAGOT J.

The question of law in the special case

189 The question of law stated by the parties for the opinion of the Court in the special case is:

"Do the Commonwealth and its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?"

190 The significance of the dates in this question is that 28 July 2022 is the date on and from which the defendant, the Commonwealth, accepts that the plaintiff's medical condition rendered him medically unfit to travel by any commercial aeroplane. Consequently, the defendant also accepts that since 28 July 2022 there has been no real prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future. The date 8 November 2023 is the date on which the Court made orders in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ("*NZYQ*").²⁴¹ Those orders included an answer to a question of law in a special case to the effect that ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) were beyond the legislative power of the Commonwealth insofar as they applied to plaintiff NZYQ. This answer followed from the Court having re-opened and overruled its earlier holding in *Al-Kateb v Godwin* ("*Al-Kateb*")²⁴² that those provisions did not contravene Ch III of the *Constitution* in their application to an unlawful non-citizen in respect of whom there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. These circumstances explain why the defendant also accepts that the involuntary detention of the plaintiff in this case as an unlawful non-citizen by an officer of the Commonwealth purportedly under ss 189(1) and 196(1) of the *Migration Act* from 28 July 2022 until 8 November 2023 was not authorised by those provisions and would constitute the commission by the officer of the Commonwealth of the tort of false imprisonment against the plaintiff. The defendant concedes it would be vicariously liable for the acts of its officer, subject to recognition of a new defence to liability for that tort as the defendant proposes.

191 The common law of Australia does not presently recognise a defence to liability for the tort of false imprisonment by reason of a defendant having acted to restrain the liberty of another person under a reasonable but mistaken belief that they were subject to a statutory duty to effect that restraint. The tort is one of strict liability and for a defendant to have acted in good faith in unlawfully detaining

241 (2023) 280 CLR 137.

242 (2004) 219 CLR 562.

another person has never provided a defence of justification for the commission of false imprisonment in the common law of Australia.

192 *Queensland v Stradford (a pseudonym) ("Stradford")*²⁴³ did not create such a defence. Rather, *Stradford* modified (or clarified) in two respects the scope of existing common law judicial immunity from civil suit, including the tort of false imprisonment, in respect of an exercise of judicial power. In *Stradford* it was held that: (i) the judicial immunity from civil suit in respect of an exercise of judicial power which had always applied to judges of superior courts of record also applies to judges of inferior courts;²⁴⁴ and (ii) in consequence, the immunity derived from judicial immunity which had always applied to a person under a duty to execute an order of a superior court of record also applies to a person under a duty to execute an order of an inferior court.²⁴⁵ *Stradford* thereby aligned the scope of the doctrine of judicial immunity from civil suit in respect of an exercise of judicial power as between superior courts of record and inferior courts.

193 The alignment of the scope of the doctrine of judicial immunity effected in *Stradford* reflects both the contemporary fact that the Australian judiciary is fully professionalised, each judge being legally qualified and bound by oath or affirmation, in effect, to "do right to all manner of people according to law without fear or favour, affection or ill-will",²⁴⁶ and that the consequential institutional imperative of protecting the fact and the appearance of judicial independence and impartiality in order to maintain the rule of law applies equally to superior courts of record and inferior courts. That the derivative immunity flowing from judicial immunity for persons under a duty to execute court orders was also consequentially aligned as between orders of superior courts of record and inferior courts reflects that the institutional imperative of vindicating judicial authority also applies equally to superior courts of record and inferior courts.

194 The defendant acknowledges that for the Court to answer the question of law in the stated case in the affirmative it would be necessary for the Court to recognise a new defence to the tort of false imprisonment available to officers of the Commonwealth having acted to restrain the liberty of another person under a reasonable but mistaken belief that they were subject to a statutory duty to effect that restraint. The defendant proposes further that the source of the mistaken belief

243 (2025) 99 ALJR 396; 421 ALR 376.

244 (2025) 99 ALJR 396 at 406 [2], 407-408 [12], 418 [76], 424-425 [112]; 421 ALR 376 at 379, 381, 394-395, 403-404.

245 (2025) 99 ALJR 396 at 408 [13], 433 [149], 434 [156]; 421 ALR 376 at 381, 415, 417.

246 See, eg, *High Court of Australia Act 1979* (Cth), s 11 and Schedule.

must be authority of this Court establishing that the statutory duty applied as understood by the officers of the Commonwealth at the time they effected and continued the restraint of the person. The defendant relies on *Stradford* as providing an analogical foundation for the recognition of this new defence.

195 The proposed new defence to the tort of false imprisonment is not supported by the reasoning in *Stradford*, is not closely (or at all) analogous to the modification to the common law concerning judicial immunity effected by *Stradford*, lacks cogent foundation, and is inconsistent with constitutional and common law principles. Accordingly, the question of law posed in the stated case must be answered "No".

***Stradford's* modification to or clarification of common law doctrine**

196 The modification to or clarification of the scope of the common law doctrine of judicial immunity effected by the reasoning of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ in *Stradford* was modest. As noted, at most, this reasoning aligned the scope of the doctrine of judicial immunity from civil suit in respect of an exercise of judicial power as between judges of superior courts of record and judges of inferior courts referred to in s 77(iii) of the *Constitution* (irrespective of whether those courts are invested with federal jurisdiction).²⁴⁷ From this, a consequential alignment of the scope of derivative immunity followed.²⁴⁸

197 As explained in *Stradford*, the extent to which common law judicial immunity differed between superior courts of record and inferior courts in Australia was unclear.²⁴⁹ Lack of clarity in the common law is a proper foundation for modification of common law principle to enhance clarity and internal consistency of the whole body of the law. As Barwick CJ explained, in the common law method the "law develops case by case, the Court in each case deciding so much as is necessary to dispose of the case before it"²⁵⁰ and by "a course of decision in which the application of general statements is illustrated by example".²⁵¹ Further, as Gageler J observed in referring to the extra-judicial statements of Sir Frederick Jordan and Oliver Wendell Holmes, in the common law method the "general principles of the common law are ...'built up' from the

247 (2025) 99 ALJR 396 at 424-425 [112]-[113]; 421 ALR 376 at 403-404.

248 (2025) 99 ALJR 396 at 433 [150]; 421 ALR 376 at 415.

249 (2025) 99 ALJR 396 at 406 [1]; 421 ALR 376 at 379.

250 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490.

251 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490, quoting *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 669.

'collation of decided cases"',²⁵² in accordance with "the adage that the life of the common law has been not logic but experience",²⁵³ case-by-case adjudications enabling principles to be "monitored by reference to how well they fit within the wider body of the law and how well they work in practice."²⁵⁴ It follows that "performance of an adjudicative function in an adversary setting 'proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy'".²⁵⁵

198 Reasoning first from the basis that two of the institutional imperatives underlying the common law doctrine of judicial immunity, to facilitate the independent and impartial performance of the judicial function free from the spectre of litigation and thereby to enhance public confidence in the independence and impartiality of judicial decision-making, are the same for judges of all courts in Australia, *Stradford* decided that judicial immunity from civil suit must apply irrespective of the status of the court as a superior court of record or as an inferior court.²⁵⁶

199 Reasoning second from the basis that the rationale upon which the common law provided a derivative immunity to those under a duty to execute the orders of a superior court of record, such actions being "acts done in the execution of justice, which are compulsive",²⁵⁷ "rooted in the order and underlying process being judicial", and "an aspect of the 'protection of the authority of judicial proceedings'",²⁵⁸ applies equally to those under a duty to execute the orders of an inferior court, the reasoning in *Stradford* also aligned the scope of the derivative immunity as between persons acting under a duty to execute orders of a superior

252 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 598 [79], quoting Jordan, *Appreciations* (1950) at 58-59.

253 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 598 [80], citing Holmes, *The Common Law* (1881) at 1.

254 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 598 [79].

255 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [58], quoting *Clubb v Edwards* (2019) 267 CLR 171 at 217 [137].

256 See, eg, (2025) 99 ALJR 396 at 406 [2]-[3], 407-408 [12], 417-418 [75]-[76], 423 [100], 424-425 [112]-[113]; 421 ALR 376 at 379, 381, 394-395, 401, 403-404.

257 (2025) 99 ALJR 396 at 428 [128]; 421 ALR 376 at 408, quoting *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225.

258 (2025) 99 ALJR 396 at 428 [128]; 421 ALR 376 at 408, quoting *Kable v New South Wales* (2012) 293 ALR 719 at 728 [27], 730 [35].

court of record and an inferior court.²⁵⁹ As the reasoning in *Stradford* explained, this reflected that the institutional need "for inferior courts to function by having their orders enforced" is the same as that of superior courts of record.²⁶⁰

200 The modification to or clarification of the scope of the common law doctrine of judicial immunity (of a judge making an order, including an order to restrain a person's liberty) and of the immunity derived from it (for persons under a duty to execute such an order) effected by *Stradford* also otherwise accorded with the principles regulating judicial development of the common law. The modification to or clarification of the common law effected by the reasoning in *Stradford*: was founded on the existing doctrine of judicial and derivative immunity; at most represented a relatively minor and incremental extension to the existing doctrine;²⁶¹ reflected an adjustment properly responsive to the contemporary reality of a fully professionalised judiciary throughout the judicial hierarchy in Australia; was no more than necessary to achieve coherence in and stability of existing doctrine given that contemporary reality; and introduced no conflict within the overall body of the law, but, rather, harmonised its content to remove potential tension in the operation of existing doctrine.²⁶² The same cannot be said for the defendant's proposed new defence to liability for Commonwealth officers committing the tort of false imprisonment in purported execution of their statutory duty and the derivative defence the defendant contends would thereby be available to the Commonwealth itself.

No analogy to *Stradford*

201 The defendant characterised recognition of the new defence to liability for officers of the Commonwealth in respect of the false imprisonment of the plaintiff as "closely analogous" to the immunity recognised to be available to the respondents in *Stradford* under the duty to execute the judge's orders for imprisonment of the applicant. According to the defendant, the recognition of the new defence, consistent with the reasoning in *Stradford*, would reflect the

259 See, eg, (2025) 99 ALJR 396 at 429 [132]-[133], 433 [149]-[151], 434 [153]-[156]; 421 ALR 376 at 410, 415-417.

260 (2025) 99 ALJR 396 at 429 [132]; 421 ALR 376 at 410.

261 See, eg, *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at 546 [78]; *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 967 [37]; 418 ALR 639 at 649.

262 See, eg, *Breen v Williams* (1996) 186 CLR 71 at 115.

underlying importance of the duty of the executive to comply with the law, an aspect of the rule of law assumed by the *Constitution*.²⁶³

202 As the defendant puts it, this Court having decided in *Al-Kateb* that ss 189(1) and 196(1) of the *Migration Act* validly applied to impose a duty on Commonwealth officers to detain an unlawful non-citizen irrespective of whether it was reasonably practicable to remove that person from Australia in the reasonably foreseeable future, the Commonwealth officer in the present case was bound to act in accordance with that statutory duty by detaining the plaintiff. The defendant contended that it would be as (if not more) invidious to and as destructive of the rule of law for the Commonwealth officer in the present case to be liable for the false imprisonment of the plaintiff as it would have been for the respondents in *Stradford* who were bound to execute the judge's orders. The respondents in *Stradford* were bound to execute a single order of the judge whereas the Commonwealth officer in the present case was subject to an apparent ongoing statutory duty to detain all unlawful non-citizens. The defendant submitted further that it would have been impossible for the Commonwealth officer in the present case to have ascertained that, contrary to *Al-Kateb* and as ultimately held in *NZYQ*, ss 189(1) and 196(1) of the *Migration Act* were not constitutionally valid insofar as they purported to apply to an unlawful non-citizen in respect of whom there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future.

203 These arguments for the defendant assume (wrongly) that the relevant starting point is to compare the position of the relevant officer of the Commonwealth subject to the duty imposed by ss 189(1) and 196(1) of the *Migration Act* to the position of the relevant respondents in *Stradford* subject to the duty to execute the judge's orders. From that starting point, the arguments next assume (wrongly) that the applicable criterion for comparison between the relevant officer of the Commonwealth (on the one hand) and the relevant respondents in *Stradford* (on the other hand) is their susceptibility to liability in a suit for false imprisonment. Within that (wrong) conceptual framework, the comparison yields the (wrong) answer that the position of the relevant officer of the Commonwealth and the relevant respondents in *Stradford* is "closely analogous" because the members of each class, without a defence to or immunity from suit, are susceptible to liability for false imprisonment in circumstances where each has acted in accordance with an apparent legal duty.

204 The defendant's starting point of comparing the position of the relevant officer of the Commonwealth to the relevant respondents in *Stradford* inverts the

263 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193, quoted in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103] and *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [40].

reasoning process in that case. In *Stradford*, the immunity from liability of the relevant respondents for the tort of false imprisonment was derived from and a necessary consequence of the principal immunity of members of the judiciary from civil suit for their exercises of judicial power. In the present case, the defendant proposes the reverse – that the principal defence to liability would be that of the officer of the Commonwealth subject to the duty imposed by ss 189(1) and 196(1) of the *Migration Act* and that the Commonwealth would then derive its own defence from that of its officer.

205 That starting point is wrong because it avoids the importance to the reasoning in *Stradford* of the foundation of policy and principle underlying the doctrine of judicial immunity from civil suit for an exercise of judicial power, being the institutional imperative of the maintenance of the rule of law which judicial immunity serves. The consequence is that the defendant's starting point assumes away or circumvents consideration of the difference between judicial power (on the one hand) and legislative and executive power (on the other hand), contrary to the separation of powers embodied in Chs I, II and III of the *Constitution*, within which the common law of Australia operates. From the constitutional separation of powers it follows that the proper starting point for the required analysis is the nature of judicial power as the justification for the doctrine of judicial immunity from civil suit (and the derivative immunity of those under a duty to execute judicial orders) compared to the nature of legislative and executive power as the justification for the recognition of the new defence for those Commonwealth officers under a duty to execute legislative commands (and the derivative defence of the Commonwealth for the acts of its officers).

206 As explained in *New South Wales v Kable* ("*Kable (No 2)*"),²⁶⁴ the "roots of the doctrine [of judicial immunity] ... lie in the nature of judicial power".²⁶⁵ Further, the doctrine of judicial immunity reflects "the distinction between the exercise of judicial power (by the *final* quelling of controversies according to law) and the exercise of executive power (*subject* to law)",²⁶⁶ to which may be added the exercise of legislative power (subject to the *Constitution*, the meaning and operation of which is "emphatically the province and duty of the judicial department to say"²⁶⁷).

264 (2013) 252 CLR 118.

265 *Kable (No 2)* (2013) 252 CLR 118 at 133 [33].

266 *Kable (No 2)* (2013) 252 CLR 118 at 134 [34] (emphasis in original).

267 *Marbury v Madison* (1803) 5 US 137 at 177.

207 Within the framework of "the function of the judicial branch of government ... to declare and enforce the law",²⁶⁸ the effect of the performance of the judicial function by deciding a case and making orders is necessarily retrospective. A judicial declaration or holding in respect of the meaning and operation of a statute is a declaration or holding of the meaning and operation of a statute since its enactment in the form the subject of the declaration or holding. In contrast to the nature of an exercise of legislative power, which may be prospective only, no such judicial declaration or holding is capable of mere prospective operation, preserving the past from the effects of the declaration or holding.²⁶⁹ Within this framework, in which a judicial declaration or holding is constitutive of past legality, judicial immunity from civil suit protects the fact and the appearance of the independence and impartiality of each member of the judicial branch (as reflected in the judicial oath or affirmation that each judge must take which specifically requires judges to exercise judicial power "without fear or favour, affection or ill-will"²⁷⁰). It does so by removing the spectre of the judge being sued in separate proceedings for an exercise of judicial power.

208 Protecting the fact and the appearance of judicial independence and impartiality is essential to the functioning of the judicial branch and therefore to the maintenance of the rule of law which the *Constitution* assumes as the fundamental underpinning of the compact it represents.²⁷¹ The common law recognises a derivative immunity of those charged with the duty to execute judicial orders because that derivative immunity serves the same systemic imperative of maintaining the fact and the appearance of judicial independence and impartiality, and enables an exercise of judicial power to be vindicated. Without judicial immunity and its derivative immunity, it is readily apparent that the systemic imperative of the maintenance of the rule of law which the *Constitution* assumes would be subject to significant, perhaps untenable, stress.

209 Within the framework of Commonwealth legislative power (to enact laws of the Commonwealth, subject to limits imposed by the *Constitution*²⁷²) and Commonwealth executive power (to execute and maintain the *Constitution* and the

268 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

269 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

270 See, eg, *High Court of Australia Act 1979* (Cth), s 11 and Schedule.

271 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466.

272 *Constitution*, s 51.

laws of the Commonwealth,²⁷³ subject to limits imposed by the *Constitution* and those laws of the Commonwealth), there are no systemic imperatives for members of Parliament equivalent to the imperatives for the rule of law of protecting judicial independence and impartiality for members of the judicial branch. To the contrary, our system of government expects prospective Parliamentary members to exercise their functions having regard to party or other political allegiances and specific social and economic policies and objectives. This is reflected in the terms of the Parliamentary oath or affirmation under which members must swear or declare that they will be faithful and bear true allegiance to the monarch according to law.²⁷⁴ Further, members of the legislative branch of government do not exercise legislative power by voting on proposed enactments in Parliament. Rather, by s 1 of the *Constitution*, the legislative power of the Commonwealth is vested in the Federal Parliament, consisting of "the Queen [now King], a Senate, and a House of Representatives". Enacted laws are laws of Parliament. Moreover, subject to constitutional limits and the discipline of the ballot box, Parliament is free to enact laws both as and when it sees fit "for the peace, order, and good government of the Commonwealth".²⁷⁵ Members of Parliament are not bound to decide disputes which come before them but can, as and when they see fit, vote to change the law having regard to party or other political allegiances and to achieve certain social and economic policies and objectives as appears appropriate to them at the time. Accordingly, legislation may be amended or repealed from time to time depending on contemporary parliamentary assessments of its fitness for purpose. Within this regulatory framework, members of the Commonwealth Parliament are not exposed to liability in a civil suit for having merely voted in Parliament to enact legislation commanding officers of the Commonwealth to take action which, by subsequent judicial decision and order, may be declared to be beyond legislative competence in whole or in part – or to have a different meaning from that understood by the executive to be the case.

210 These different frameworks of judicial power (on the one hand) and legislative and executive power (on the other hand) expose that there is no institutional or other imperative for the Commonwealth (as the legal entity assumed in this case to be capable of suing and being sued for action of its officers taken under Commonwealth legislation²⁷⁶) to be protected from civil suit by the equivalent of judicial immunity. There being no justification for such a principal immunity on the part of the Commonwealth, there can be no derivative immunity

273 *Constitution*, s 61.

274 *Constitution*, s 42 and Schedule.

275 *Constitution*, s 51.

276 *Judiciary Act 1903* (Cth), s 38(c) and (d), Pt IX.

for Commonwealth officers under a duty to execute the commands in Commonwealth legislation.

211 Even from the wrong starting point of the position of the Commonwealth's officer, the only apparent justification for the new defence being supposedly analogous to the immunity of the relevant respondents recognised in *Stradford*, on analysis, collapses into a generalised notion of it being unfair or unjust for the Commonwealth's officer to be exposed to civil liability for having acted in accordance with the officer's apparent statutory duty.²⁷⁷ Again, the distinctive nature of judicial power is critical to understanding why a perception of unfairness to the Commonwealth's officer involves the wrong focus. The judicial power of the Commonwealth is to quell actual (not hypothetical or merely possible) controversies between parties. Without parties bringing a dispute before a court of proper jurisdiction, there can be no exercise of judicial power by judicial order. Parties choose whether to invoke a court's jurisdiction to quell a dispute, including the jurisdiction of any appellate court to review a judicial order. It follows that whether at all and, if so, the time when the meaning or constitutional validity of any legislative provision is subject to judicial decision and order depends on choices made by parties. Courts, unlike Parliaments, do not get to choose what matter to decide or when to decide that matter. If and when parties in dispute invoke a court's jurisdiction to decide the meaning and the validity of a law, a judicial decision and order will be made. Before any such judicial order is made it is the duty of the executive to execute the legislation based on its understanding of the terms of the law.

212 Within this context it is necessary to recognise that, while one fundamental aspect of the common law of Australia is the doctrine of precedent, so that (for example) decisions of this Court bind all other courts, an equally fundamental aspect of the common law of Australia is that this Court may re-open and overrule its own decisions, albeit that in doing so this Court applies "a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law".²⁷⁸ Further, and subject to the doctrine of precedent, other courts may also re-open and overrule their own decisions.

213 Take *Stradford* as an example. In that case, the primary judge decided that the respondent judge, being a judge of an inferior court and not a superior court of record, was liable in a civil suit for false imprisonment for having made judicial

²⁷⁷ Pursuant to both ss 189(1) and 196(1) of the *Migration Act* and, for example, s 13(4) of the *Public Service Act 1999* (Cth), which provides that "[a]n [Australian Public Service ("APS")] employee, when acting in connection with APS employment, must comply with all applicable Australian laws".

²⁷⁸ *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70]; *NZYQ* (2023) 280 CLR 137 at 150 [17].

orders which caused the applicant's imprisonment. It followed, on the primary judge's reasoning, that the persons who had executed those orders in accordance with their apparent duty to do so were also liable for damages for the commission of the tort of false imprisonment of the applicant.²⁷⁹ The primary judge's conclusion resulted from his Honour's "endeavour to distil the applicable principles from the authorities", which were described as not "entirely pellucid" and as "stretching back over 400 years".²⁸⁰ Needless to say, the primary judge might well have reached the contrary conclusion without offending the doctrine of precedent. If the primary judge had done so, the applicant may or may not have appealed the primary judge's orders, just as the respondents to that action had to decide whether to appeal against those orders to the effect that they were liable for false imprisonment. If the primary judge had decided that the respondents were not liable and the applicant had not appealed, the ratio of the primary judge's decision would have represented the law and been subject to the doctrine of precedent as applicable to such a decision. In neither circumstance could the primary judge's decision and orders have operated to prevent a subsequent party from challenging the correctness of the ratio of the primary judge's decision. If another court overruled that ratio as incorrect, the primary judge's decision would have continued to bind the parties to that decision, but the undetermined claims of other applicants and plaintiffs would have to be decided according to the law as applicable at the date of the judicial decision of their claims. That different effect on decided and undecided claims is a necessary and fundamental characteristic of judicial decisions and orders made in the exercise of judicial power.

214

The contrary decisions as to the limit of constitutional validity of ss 189(1) and 196(1) of the *Migration Act* in *Al-Kateb* and *NZYQ*, as exercises of judicial power, each had the same characteristics. Had the issue in *Al-Kateb* not been litigated, the executive would have been bound to execute ss 189(1) and 196(1) of the *Migration Act* as the executive understood the law to be. Only if and when the jurisdiction of this Court was properly invoked to decide the meaning and the limit of the constitutional validity of those provisions would the executive be bound to execute those provisions consistently with the meaning and validity of the provisions as declared or held by this Court. Had the Court in *Al-Kateb* reached the same conclusion as to the limit of constitutional validity expressed in *NZYQ*, persons unlawfully detained outside of those limits before that decision would have had a claim against the Commonwealth and its officers for false imprisonment (assuming any such claim had not been made and finally determined at an earlier time). As it was, the Court did not reach that conclusion in *Al-Kateb* but has now done so in *NZYQ*, with the same effect that persons unlawfully detained outside of those limits before that decision have a claim against the Commonwealth and its officers for false imprisonment (assuming any such claim

²⁷⁹ *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020.

²⁸⁰ *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [340]-[341].

has not been made and finally determined at an earlier time). That *Al-Kateb* was decided as it was never removed the fact that the ratio of that decision was open to subsequent challenge and that this Court had the capacity to re-open and overrule that decision. There can be no relevant unfairness to the Commonwealth or its officers arising from these inherent characteristics of judicial decisions and orders being an exercise of judicial power.

215 That *Al-Kateb* was decided as it was also never altered the fact that the sole source of the duty of Commonwealth officers to execute the legislative provisions was those provisions as enacted as a law of the Commonwealth. The Court in *Al-Kateb* decided the controversy between the appellant and the Commonwealth officers in that case as to the meaning and limit of the constitutional validity of those legislative provisions. The Commonwealth Parliament enacted those provisions and had the capacity to amend or repeal those provisions after *Al-Kateb*. Subject to legislative competence, it is not uncommon for Parliament to amend legislation if a court has interpreted it to have a particular meaning or to be invalid in a particular application to ensure the legislation operates as Parliament intends.

Recognising the new defence is contrary to constitutional and common law principle

216 "Of necessity, the common law must conform with the [*Constitution*]. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the [*Constitution*] cannot be at odds."²⁸¹ The conclusion that the new defence is inconsistent with constitutional imperatives and otherwise runs counter to common law principles in terms of both the substance of the law and its development does not require consideration of the dispute between the parties about the source of the Commonwealth's liability for the acts of its officers being direct or vicarious. That dispute does not matter to the issues of constitutional and common law principle in this case (albeit that, as noted, the defendant concedes that it would be vicariously liable for the acts of the officer of the Commonwealth in unlawfully detaining the plaintiff but for the new defence).

Constitutional principles

217 Within the Australian constitutional framework, the executive branch of government must comply with the law as in force from time to time and in

281 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 (footnote omitted), citing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 140.

accordance with the meaning and effect given to the law by the judicial branch.²⁸² That a judicial decision about the meaning and effect of a law may be overruled by a later judicial decision and that the later judicial decision thereby declares the meaning and effect of the law as it has always been are fundamental characteristics of judicial power, a "hallmark" of which has "long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct".²⁸³ Sir Owen Dixon described the applicable "general doctrine" as meaning that "when for want of, or excess of, legal power or authority or for non-fulfilment of the conditions required by law, any purported act in the law is invalid, then rights and liabilities are to be ascertained upon the same footing as if the act had not been attempted".²⁸⁴ The retrospective effect of judicial decisions, by reason of which past legality or illegality is constituted, is an important aspect of the checks and balances our *Constitution* achieves between the different branches of government.

218 The most important way in which the constitutional separation of judicial power from legislative and executive power maintains the rule of law is by ensuring that "the life, liberty, and property of the subject [is not] in the hands of arbitrary judges, whose decisions [are] then regulated only by their own opinions, and not by any fundamental principles of law".²⁸⁵ The centrality to our form of government of protection of the liberty of the individual from unlawful interference is reflected in that fact that the "separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges".²⁸⁶ The tort of false imprisonment and the writ of habeas corpus are two powerful common law restraints on unlawful exercises of state power interfering with individual liberty, reflecting the principle that subject to "exceptional cases" the involuntary detention of a citizen in custody, being penal or punitive in character, "exists only as an incident of the exclusively judicial function of adjudging and punishing

282 See, eg, *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56].

283 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

284 Dixon, "De Facto Officers" (1938) 1 *Res Judicatae* 285 at 285, reproduced in *Jesting Pilate and Other Papers and Addresses*, 2nd ed (1997) at 229, as quoted in *Haskins v The Commonwealth* (2011) 244 CLR 22 at 42 [45].

285 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 606, quoting Blackstone, *Commentaries*, 17th ed (1830), vol I at 269.

286 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11.

criminal guilt",²⁸⁷ the rationale for which is that "[e]very citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of law, but ... can be punished for nothing else'".²⁸⁸

219 That the kind of civil wrong that would be subject to the new defence is the tort of false imprisonment, which together with the writ of habeas corpus protects individual liberty from unlawful interference, indicates that the change to the common law which recognition of the new defence would involve has a potential systemic significance far more extensive than the submissions for the defendant contemplates.

220 This being so, it is not to be assumed that any apparent unfairness or injustice in the susceptibility of Commonwealth officers to liability in a civil suit for committing a civil wrong, in circumstances where the officers have in good faith executed a law in accordance with a judicial decision subsequently overruled, is other than our system of government operating as intended. That this paradigm represents the system operating as intended by our constitutional framework indicates that the new defence, if recognised by this Court, would involve a fundamental shift in the constitutional compact between the individual and the state inconsistent with the existing balance struck between the different branches of government.

221 An essential element of the tort of false imprisonment is the absence of lawful authority for the restraint on the liberty of the person. Once a restraint on liberty is proved it is for the defendant to prove lawful authority or other defence by way of justification.²⁸⁹ For the common law to recognise the new defence would mean that even if a defendant did not have lawful authority for the restraint, the new defence would protect the defendant from liability. By such means the protection of individual liberty from unlawful interference which the constitutional separation of judicial power from legislative and executive power secures would be diminished in respect of the liability of those very persons, officers of the Commonwealth, most likely to be purportedly empowered by statute to interfere with the liberty of the individual.

222 Accordingly, for this Court to recognise a new defence of justification immunising officers of the Commonwealth, and thereby the Commonwealth itself, from liability for false imprisonment as proposed would represent a significant

287 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

288 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28, quoting Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202.

289 eg, *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 206-207 [24]-[25].

shift in the constitutional checks and balances on excesses of legislative and executive power in respect of a value – the protection of individual liberty from unlawful interference by state power – that lies at the heart of both the rationale for the separation of judicial power and the necessity of an independent and impartial judiciary. Such a development of the common law in Australia would run counter to the constitutional imperatives which the separation of judicial power in Ch III of the *Constitution* was intended to safeguard.

Common law principles

223 None of the existing defences of justification for the tort of false imprisonment include the restraint of another person based on a good faith but mistaken belief that the restraint was, for example, authorised or necessary. In the common law stream this country inherited from England, the only case approaching a good faith defence which the defendant could identify is *Percy v Hall*.²⁹⁰ That case contains dicta to the effect that police acting to arrest a person based on a reasonable belief that the person was breaching byelaws (a form of delegated legislation) would not be liable for false imprisonment if the byelaws were void for uncertainty. Being confined to police powers of arrest said to have been necessary "in the public interest",²⁹¹ the case provides no analogy to the new defence the defendant proposes. As explained below, moreover, in the subsequent decision of *R v Governor of Brockhill Prison, Ex parte Evans [No 2]*,²⁹² *Percy v Hall* was not applied, Lord Hope of Craighead distinguishing the reasoning in *Percy v Hall* as effectively confined to its facts.²⁹³

224 The upshot of this is that the new defence would be inconsistent with the common law's insistence that justification for acts that would otherwise constitute the tort of false imprisonment must be authorised in law (not merely purportedly authorised) or necessary in fact (not merely believed to be necessary) to protect the person restrained or another person from harm.²⁹⁴ If this Court recognised the new defence, it would introduce into a stable and coherent body of law concerning the tort of false imprisonment a source of incoherence and tension with the other classes of defence by way of justification.

290 [1997] QB 924.

291 *Percy v Hall* [1997] QB 924 at 947-948.

292 [2001] 2 AC 19.

293 [2001] 2 AC 19 at 34-35.

294 *Watson v Marshall and Cade* (1971) 124 CLR 621 at 627, affirmed in *Marshall v Watson* (1972) 124 CLR 640.

225 There is no common law analogy available to justify the new defence. Accordingly, if recognised, the defence would not represent an incremental development of the common law of Australia. It would be a novel and *sui generis* defence giving an immunity to Commonwealth officers for committing the civil wrong of false imprisonment based on what is later established to be a mistaken understanding of the constitutional limits of a law. From that immunity the Commonwealth itself would derive immunity from civil suit in the circumstances described by the defendant. Those circumstances, which require both a decision of this Court to have been the source of the mistaken belief and a subsequent decision of this Court overruling the earlier decision to be the source of subsequent correction of the mistaken belief, would themselves introduce considerable incoherence and instability into the common law. While the defendant described the formulation of the new defence as reflecting the cautionary approach of a court deciding no more than is necessary to resolve the immediate dispute, the rationale for that cautionary approach is to protect the fact and the appearance of the coherence and continuity of the law by protecting legal doctrine from radical change, so that the law develops in response only to the actual exigencies of the immediate case. It would conflict with that cautionary approach for this Court to develop a new common law defence without considering its overall systemic effects.

226 Unresolvable questions about the scope of the new defence are obvious. Why would such a defence, if recognised, be confined to false imprisonment and not extend at least to other, related, wrongs such as trespasses to the person? Why must it be a decision of this Court, as opposed to any court of relevant jurisdiction, that is the source of both the mistaken belief and its subsequent correction? How is the confining of the new defence to the operation of two decisions of this Court consistent with the common law doctrines of precedent and finality as they apply to different types of judicial decisions and orders?

227 There is also apparent tension between the new defence and s 64 of the *Judiciary Act 1903* (Cth), which provides that in "any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject". Because the new defence of the Commonwealth would be derived from the new defence of its officers, the rights of a party in a suit against the Commonwealth for false imprisonment, if the defence applied, would not be as nearly as possible the same as in a suit between subject and subject.

No relevant foreign precedent

228 The common law of each of Canada and the United States is subject to different constitutional imperatives and different common law traditions. Therefore, decisions from those jurisdictions provide no assistance in determining if the common law of Australia should recognise the new defence.

229

Contrary to the submissions for the defendant, English authority does not assist its case. It is not to the point that *R v Governor of Brockhill Prison, Ex parte Evans [No 2]*²⁹⁵ does not concern legislation held by a court to be valid in one application and subsequently declared to be invalid in that same application. The case concerned a reasonable but mistaken belief on the part of a member of the executive branch (a prison governor) about the operation of a law based on multiple court decisions which were subsequently held to be incorrect and overruled. As Lord Slynn of Hadley put it, the applicant was not lawfully detained for the additional period the governor had incorrectly calculated as part of the applicant's sentence, despite that calculation according with the governor's duty to detain the applicant as understood based on earlier court rulings. Rather, the applicant "was merely thought to be lawfully detained", which was "not a sufficient justification for the tort of false imprisonment even if based on rulings of the court". Further, "[a]lthough in form it is the governor, it is in reality the State which must compensate [the applicant] for [the applicant's] unlawful detention".²⁹⁶ Lord Browne-Wilkinson summarised the case as one resolved "on the grounds that false imprisonment is a tort of strict liability, the consequences of which cannot be escaped even by showing that the defendant acted in accordance with the view of the law which at the time was accepted by the courts as being correct".²⁹⁷ Lord Steyn referred with approval to the decision of the New South Wales Court of Appeal, *Cowell v Corrective Services Commission of New South Wales*,²⁹⁸ to the effect that a prison authority "could be liable for unlawful imprisonment in spite of the fact that those responsible for the detention acted in good faith in accordance with the law as they understood it".²⁹⁹ Lord Hope distinguished *Percy v Hall*³⁰⁰ by effectively confining the defence of justification held to be available in that case to police arresting and detaining a person in accordance with a byelaw subsequently held to be invalid,³⁰¹ expressing the conclusion that the "defence of justification [for the tort of false imprisonment] must be based upon a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful".³⁰² Lord Hobhouse of

295 [2001] 2 AC 19.

296 [2001] 2 AC 19 at 26.

297 [2001] 2 AC 19 at 27.

298 (1988) 13 NSWLR 714.

299 [2001] 2 AC 19 at 29.

300 [1997] QB 924.

301 [2001] 2 AC 19 at 34.

302 [2001] 2 AC 19 at 35.

Woodborough said "[i]mprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say that he believed that he could justify it. In contrast with the tort of misfeasance in public office, bad faith is not an ingredient of the tort; it is not a defence for the defendant to say that he acted in good faith".³⁰³

Answer to the question of law

230 For these reasons, the question of law stated by the parties for the opinion of the Court must be answered "No".

303 [2001] 2 AC 19 at 42.

